# AN IDEA OF THE *Modern Eloquence* Of the BAR.

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Together with a *Pleading* out of every Part of *Law*.

*Written by Sir* George Mackenzie *of* Roſehaugh, *Advocate to King* Charles II.

Tranſlated into *Engliſh*.

*Pulchra enim, &, ut ita dicam, pudica oratio non eſt maculoſa, nec turgida; ſed naturali pulchritudine exſurgit.* Petronius.

*EDINBURGH*,
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# THE DEDICATION.

# THE DEDICATION

## *Of the Tranſlator,*

To the Right Honourable Sir *James Mackenzie* of *ROYSTON* Baronet, One of the *Senators* of the *College* of *Juſtice*, and one of the Lords Commiſſioners of the *Juſticiary*.

*MY LORD,*

THE Addreſs of the following *Tranſlation* is ſo very juſtly due to your *Lordſhip*, that I no ſooner reſolv'd to publiſh it, than I had my Patron in View.

It was impossible for me to turn into *English* the *Pleadings* of my ingenious Author, without feeling my self powerfully dispos'd to take this Occasion of expressing my Esteem and Respect for one who is so nearly related to his Illustrious Family.

I shall not insist upon your *Lordships* personal Qualities; nor need I mention a *Maxim*, which is generally known and receiv'd, *That a skilful Lawyer never fails to make an able Judge.*

Instead then of addressing my self, in the ordinary Stile

of

of *Dedications*, to one who makes ſo conſiderable a Figure among the Living, I ſhall take a diſtant View of that eminent deceas'd *Lawyer*, ſome of whoſe Writings I have attempted to tranſlate.

Sir *George Mackenzie*'s Character is already ſo well known and eſtabliſh'd in the World, that it is almoſt needleſs to inculcate the Praiſes of one who is ſo univerſally and juſtly eſteem'd.

Every Body allows, he was a Man of great Learning and Penetration; that he was Maſter of a clear and flowing

Stile, and has imitated in his Works that beautiful Simplicity which we so much admire in the *Ancients*. He was a Person of Candor and Sincerity in all his Actions, and of indefatigable Industry and Application in Business: Insomuch that the Character of *Labeo*, the *Roman* Lawyer, which he takes Notice of in the *Preface* of his *Observations* on our *Acts* of *Parliament*, may, with a great Deal of Justice, be apply'd to himself.

That he was a Man of Wit and Ingenuity, does not only appear from the great Variety

of Subjects he has handled, but is also evident from the handsome Commendations which Mr. *Dryden* bestows upon him, who very frankly owns, that Sir *George* discover'd to him a great many Beauties and Delicacies in the *Classick* Authors, and was the first that made him sensible of the inimitable Turns of Poetry that are to be found in the *Ancients*. I am

My Lord,

*Your Lordship's*

*Most obedient, and*

*Most humble Servant.*

Robert Hepburn.

# THE PREFACE of the *Tranſlator*.

THE ingenious Author, in his own *Dedication*, has given ſo full and handſome an Account of the Nature and Deſign of theſe Papers, that it were impertinent to ſay any more on the Head. I therefore ſhall forbear giving my ſelf the unneceſſary Trouble of recommending a Book to the Publick, whoſe *Author* has already gain'd univerſal Applauſe; and only ſay ſomething in Defence of my own *Tranſlation*.

I own, an Attempt of this Nature, ſhould one prove ſo unlucky as not to ſucceed, might juſtly be accounted a ridi-

ridiculous Piece of Presumption.

I have often been at a Loss to think what should be the Reason why our Countrymen take so little Care to recommend themselves to the Publick by their Writings. I am confident it is not so much for want of Genius, as of a Language to express their Thoughts. We find those, who by incredible Pains and Application have render'd themselves Masters of the *Latin* Tongue, have made as considerable a Figure in the World, as any of their Contemporarys. But it is so very hard a Task to attain an absolute Command of that noble Language, that I am not surpriz'd to see People frighted from the Attempt.

'Tis true, the *Greek* and *Latin* have infinitely the Advantage of all modern Tongues; but I am sure, if we had a just Sense of the Beauties and Elegancies of the *English Language*

we would be at more Pains to acquire it, than at present we are.

The *English* Tongue is copious and manly, and significant; if we except a few Grammatical Errors, we may venture to affirm, that it is now arriv'd to its greatest Pitch of Perfection. So that if it is not so Universal, as the *Greek* or *Roman*, it will at least prove as lasting and durable as any Author can have the Vanity to imagine his Writings will be. And yet it is so extensive, that Sir *William Temple*, in his *Memoirs*, tells us, in King *Charles* II's. Time, it very much obtain'd in *Germany*, and was mightily in Vogue at the Courts of the *Electoral* Princes. And if we may be allowed to measure the Extent and Duration of a Language by the Bravery and Success of the Nation that speaks it, what an agreeable Prospect may we conceive of it at present, when the Face of Affairs is so happily

happily alter'd, and our Arms so much more usefully and victoriously employ'd than they were in that Prince's Reign?

The Works of Arch-bishop *Tillotson*, Sir *William Temple*, and Bishop *Sprat* seem to be exact Standards of the Force and Beauty, the Elegancy and Propriety of the *English* Tongue. And the ingenious Lucubrations of *Isaac Bickerstaff*, who is an inimitable Master of Stile, do give him as just a Title to preserve the Language, as to correct the Vices of his Countrymen.

The easy Cadence of the Periods is what very few of the *modern* Writers observe. And yet we find the *Ancients* took all imaginable Care to please the Ear, by rendering their Languages smooth and harmonious: *Cicero* was fond of it to Excess; and I find it remarked as a Wonder in the Notes of an old *Scholiast* upon his *Pleading* against

*Cæcilius*

*Cæcilius*, that one of his Periods ſeem'd ſomewhat harſh: For which, at laſt, the *Commentator* aſſigns this Reaſon, That in *that* Sentence he was making his *Adverſary* ſpeak. This Reflexion, (which yet to ſome may appear too refin'd) ought, methinks, to make us very much aſham'd of our extreme Ignorance and *Ruſticity* in this Matter.

I muſt confeſs, I am not very ambitious of the Name of a *Tranſlator*. The Ingredients of that Character ſeem rather to be Exactneſs and Induſtry, than Wit and Invention. My only Deſign in this Verſion was to improve my Stile and Manner of writing; But when once I had got over the whole Book, I fancied the Publick would eaſily be inclin'd to pardon the Imperfections of my firſt Attempt, if I endeavour'd to put the *Pleadings* of an eminent *Scots* Lawyer, into a more modiſh Dreſs.

THE

# THE DEDICATION

Of the AUTHOR,

To the

# *ADVOCATES*

# Of the Present Age.

Gentlemen,

*THE numerous Volumes of* Commentators *and* Expositors *have already swell'd the* Civil Law *to too great a Bulk : We are overloaded with* Decisions; *and the Writers of* Customs, *have sufficiently distracted us by their*

*their voluminous Treatiſes; ſo that now there remains no new Thing for us to handle but the* Pleadings *of the* Bar, *which, as they entertain us with ſomething that is pleaſing and agreeable, like the Charms we find in the Spring and Youth; ſo they have all thoſe ſecret and reſiſtleſs Allurements, by which Riches and Ambition have ſo mighty an Influence on the greateſt Part of Mankind. But while they appear in no other Dreſs, than what our native Tongue can beſtow upon them, they ſeem to languiſh in a melancholy Confinement. For there is ſo ſmall a Part of the World that can poſſibly peruſe them, that there is no Manner of Encouragement for an Author to be at the Pains, which ſo noble an Undertaking demands; eſpecially, ſince upon Account of the Inconſtancy of the Language, in which they are written, they ſhall not be able to out live the preſent Age, and therefore do not afford a ſufficient Recompence*

pence for all the Pains and Labour the compoſing of them has coſt us.

Books that are written in our native Tongue, while they are yet new, are nipt by Envy in the tender Bud; and when they are grown older, and have ſurviv'd the Malice of our Contemporarys, our fleeting Language inſtantly diſappears, and intirely abandons them to eternal Oblivion. So that we ſeem to be guilty of the ſame Piece of Folly and Extravagance with thoſe who erect Monuments of weak and infirm Materials, and fondly write upon the Sand what the next Wave ſhall intirely waſh away and deface.

Our Judges, after you have illuſtrated the moſt abſtruſe and difficult Points of Law, and ſet Matters before them in a clearer Light, write their own Deciſions with Abundance of Eaſe: The Profeſſors of the Civil Law write thoſe Things they teach their Scholars, without any further Pains and Trouble than what

they have already cost them. But we are such Fools as to neglect the Pleadings of the Bar, which we have mutually refin'd and adorn'd by all the Eloquence, Wit and Ingenuity whereof we are Masters, and compile large Commentarys and voluminous Treatises with more Pains and Industry than Success or Applause. And yet the one does not afford us so large a Return of Honour and Renown as the other: For in Pleadings, every Thing is new and profitable; and because of the Ambiguity and Variety of the Matters that occur in them, they admit of a great many different Turns of Thought and Expression; and this is the Reason why we are allow'd to debate them at the Bar: But in Commentarys and Expositions the Reader meets with no other Entertainment than rigid Subtletys and tedious Citations

The Pleadings of the Bar are refin'd by the warm and vigorous Debates of Advocates

vocates, *who employ upon these Occasions the utmost and sprightliest Efforts of their Wit and Invention. Whereas Commentarys are usually compos'd by one single Man, whose Wit is not sharpen'd by Opposition, nor encourag'd by the Applause of a noble* Audience, *and the Bounty and Liberality of generous* Clients.

*These Considerations have induc'd me to write my* Pleadings *in the* Latin *Tongue, that just and faithful* Repository *of Fame, which never loses those things that are committed to its Care, and instead of lessening the Sense of an Author, (if he has any) elevates and exalts it. And this I am confident is the only infallible Method of transmitting to Posterity all the ingenious and accurate* Pleadings *of the eminent* Lawyers *among us. And altho I may be somewhat discourag'd from my present Design, when I consider that after* Cicero *no Man durst ever attempt it; to whom I am infinitely more inferiour*

*in*

*in Wit and Invention, than distant from him in Time; and who, while he delivers to us the Precepts of Eloquence, discovers himself to be so absolute and inimitable a Master of it, that he effectually frights us from* Oratory *at the same Time that he professes to teach it: Insomuch that he excells the more in the Force and Majesty of his* Diction, *than in the Skill and Command of the* Latin *Tongue: (for I look upon the Harangues of* Seneca *and* Quintilian *rather as painted and feign'd Representations of* Pleadings *than real ones) I have yet this notwithstanding made bold to enter upon this Undertaking: For I am not ignorant that our* Advocates *have too many Advantages, even above those of the* Augustan *Age, to despair utterly of Success in this laudable Attempt. We have at present the* Body *of the* Civil Law, *whose Compilers did almost all of them flourish after* Cicero's *Time. Our Manner of Pleading is now*

*improv'd*

improv'd by long Practice and Experience, and that manly Force, and strong and nervous Sort of Eloquence, which is proper for the Bar, is arriv'd to its Highest Pitch of Perfection. Add to this, that the great Variety of our Municipal Laws, and the infinite Number of our famous Pleadings and Decisions, afford us a new and inexhaustible Field of Topicks and Arguments, which were utterly unknown in Cicero's Age, and furnish Abundance of Matter for the sprightliest Wits. So that if we do not gain as sure and lasting a Reputation, as some of the Ancients have done before us, it ought rather to be imputed to our unaccountable Laziness and Negligence, than to the Nature of the Thing itself, and proceeds more from Want of Courage than Invention. But I am afraid, the sordid Love of Money, that weak and treacherous Monument of Fame, and the mean Consideration of Fees and Profit, takes off too many

*ny of us from the generous Purſuit of Glory and Renown, while we endeavour more to make vaſt Eſtates for our Children, than to acquire a noble and laſting Reputation.*

*It may alſo perhaps be objected to me, that I attempt a Buſineſs of too refin'd and ſublime a Nature for one that lives in ſo cold a Climate, where the animating Rays of the Sun are ſo far remov'd from us, that they do not ſufficiently inſpire us with Life, and Vigour; But ſince our* Soul *deſcends from above, it is not to be meaſured by the Rules of* Geography, *as if it were an unactive Lump of Clay; & ſeeing it was breath'd into us by* Almighty God, *it ought to remember its divine* Original, *and boldly aſpire to the nobleſt and ſublimeſt Things: For, as it needs not the Aſſiſtance of theſe groſs and* Elementary Bodies, *it has no Reaſon to be apprehenſive of any Obſtacles or Impediments it can poſſibly encounter from 'em. A generous and ardent Emu-*

*lation*

lation, which is infinitely stronger than the Heat of the Sun, animates our Souls and inspires them with Warmth and Vigour; and the sprightly and invincible Nature of it raises and elevates them to Heaven from whence they came, firing at present with an ardent Desire of Glory and Immortality a greater Number of polite and civiliz'd Nations, than in the Days of Cicero were Orators at Rome.

We live in that Kingdom, which set Bounds and Limits to the Roman Empire, by the Bravery of its Inhabitants; and to their Eloquence, by our Buchanan's, our Barclays and Blackwoods, and other famous Writers of our Nation. And if they, who liv'd in the first Dawn of Learning, and receiv'd all their Improvements in the Obscurity of the Schools made so great a Noise in the World; what may be expected from our Advocates, who are born in a happier Age, and assisted with all the Advantages that Leisure and

*Riches, a liberal Education and the reſpectful Obſervance of* Clients *can poſſibly afford them? In whoſe Society, which is now exalted to an invidious Pitch, I am not aſham'd to own that I'm only in the Number of thoſe, who make but an ordinary Figure.*

*There are many who will perhaps think it ſomewhat inconvenient, that we are not ſo much Maſters of the* Latin *as in it to expreſs our Thoughts in an exact and agreeable Manner, and with all the Propriety and Eaſineſs of a* native Tongue: *But ſince the* Text *of the* Civil Law *flows from the pureſt and moſt uncorrupted Fountains of the* Roman Eloquence, *and the* Commentaries *of it are written by the niceſt and ableſt* Criticks *of that Language, and illuſtrated from the beſt and choiceſt of the* Roman *Authors*; Lawyers, *in my Opinion, both ought and may uſe it more elegantly and copiouſly than any other Writers.*

*There*

*There is a certain Majesty and Perspicuity in the* Latin *Tongue, which is not to be found in any other; insomuch that these Things, which in other Languages have met with a very indifferent Reception, even at Home, assoon as they appear'd in the* Roman *Dress, have been extremely valu'd all the World over. And this ought not only to be ascrib'd to the Grandeur and Majesty of the* Romans *in this surviving the Ruins of their Empire; but is also in a great Measure owing to the happy Pains and Care an Author is oblig'd to take, when he writes in* Latin: *For then he must endeavour to adjust all his Words and Expressions, and nicely consider the Nature of his Subject; since he exposes himself to the Censure of all Nations and Ages of the World.*

*And here I may, without Vanity, instance, in our own Countrymen* Craig *and* Buchanan, *who, by writing handsomely*

in that noble Language, have ſecur'd to themſelves, to all Futurity, a laſting and immortal Reputation; whereas if the one had compos'd his Hiſtory, and the other his Account of the Fewdal Law, in their native Tongue, Time would have almoſt already triumph'd over all their Labours, and depriv'd them of that glorious Character they ſo juſtly deſerve.

And yet theſe Conſiderations ſo far prevailed with me that I have confin'd my Book to as ſmall a Compaſs as I could conveniently do; and therefore, leaſt I ſhould too much weary my Reader, I have only made Choice of one Pleading out of every Part of Law, among thoſe I happen'd to be engag'd in, within the Space of a Year. If theſe meet with a favourable Reception in the World, I ſhall be encourag'd to publiſh more; and if they do not pleaſe, I think there is more than enough of them already: For I fancy, I ſhall find it eaſier to add others than to excuſe theſe.

But

*But, as they are,* Gentlemen, *I submit them to you, who are the great Masters of Reason and Eloquence, and the Preservers of Equity and Justice; who are born for the Defence and Protection of Mankind; and whose eminent Learning and Prudence are mutual Ornaments to one another. To your Judgement and Censure, I willingly and humbly submit these Papers, hoping that those Persons, who are my* Patrons *will prove favourable* Judges.

I am

Gentlemen

Your most humble Servant.

*George Mackenzie*

# The CONTENTS.

An *Idea* of the *Modern Eloquence* of the *Bar*.

*From the Law of Nature.*

First Pleading.

*By which a Woman, that had murder'd her own Child, is accus'd before the* Men *of* Inqueſt, *who, in* Scotland, *are Judges in criminal Caſes, ariſing from Matters of Facts; and wherein the Advocate pleads after the Manner of the* Roman *Orators, without adducing any* Citations *of the* Laws *or* Doctors.

DECISION.

The Pannel was condemn'd to die.

*From the Law of Nations.*

Second Pleading.

*Whether by the* Law *of* Nations *and the* Civil Law, *a Ship is acquir'd by bare Purſuit without* actual Apprehenſion?

DE-

DECISION

The Lords order'd the Witneſſes to be examin'd, Whether or not the Prize could have eſcap'd the *Man of War*, before they would determine the Point of *Law*.

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## Third Pleading.

*Whether the bare Attempt is capitally puniſh'd in the Crime of* Aſſaſſination?

DECISION

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## Fourth Pleading.

*Whether upon the* Subvaſſal's *being condemn'd for Treaſon, the* Few *ſo returns to the King, that he is not oblig'd to pay the* Subvaſſal's *Debts?*

## *From the Canon Law.*

## Fifth Pleading.

*Whether, when the Pariſh modifies a Sti-*

*pend*

*pend to a* Subſidiary *Miniſter, the Right of* Preſentation *belongs to the* Patron *of the Rector, or to the Pariſh, in Conſideration of the Stipend?*

DECISION.

The Lords determin'd it in Favour of of the Patron.

*From the Municipal Law.*

Sixth Pleading.

*Whether in* a Subſtitution *of ſeveral Degrees, the* remoter Heir, *only exiſting at the Time, the* Heritage *falls, may ſerve himſelf? Or if the* poſſible Heir *ought to be expected, becauſe he is the neareſt?*

DECISION.

The Lords found that the future and poſſible Heir was to be expected.

*This* Pleading *ſhows the Uſefulneſs of the Knowledge of the* Civil *and* Fewdal Laws *in* Municipal Cauſes.

AN

# AN IDEA OF THE *Modern Eloquence* Of the BAR.

OF all the shining Accomplishments of a generous Mind, none has the Advantage of *Eloquence*, and few can pretend to equal it.

*Princes* are usually oblig'd for the Crowns they wear, rather to the Lustre of their Birth than their personal Merit. The Intrigues of *States-*

*men*, and the *Lawrels* of *Generals* are oftner measur'd by the Success that attends them than the real Qualities of the Persons themselves; and at best they too much depend upon Chance and Fortune to deserve properly to be call'd our own. But *Orators* derive all their Glory and Reputation from themselves alone, and are not indebted for any Part of it to Fortune: Other Conquerors make themselves only Masters of the Bodies of Men, but they vanquish their Minds: Those carry Ruine and Misery along with their Conquests, but *Orators* most agreeably entertain these Persons whom they captivate by the Charms of their *Eloquence*.

Of all those who make *Oratory* their principal Study, *Advocates*, in my Opinion, may justly pretend to the noblest Character: For they excell *Courtiers* in Wit and Invention; *Philosophers*

*losophers* in Variety of Topicks and Arguments; and *Preachers* in Presence of Mind. *Courtiers* indeed make it their Business to humour the Inclinations of Princes by their admirable Skill and Address, and endeavour to insinuate themselves into the Affection of their Sovereign by their agreeable Behaviour, and their easy and polite Way of Talking. *Philosophers* are always confirming the same old *Positions* by Arguments that are too common and threed-bare: They never affirm or maintain any thing that is new, and unexpected, and neither can nor ought to prove several Points, which do yet, in their own Nature, stand very much in need of further Illustration. *Preachers*, secur'd from all Answer and Interruption, do calmly deliver the Sermons they have studied at their own Leisure, without any Noise or Disturbance: We go to Church, po-

ſſeſs'd with a firm Belief of their Doctrine before we hear it, and are rather perſwaded by the Truth of the Subject than the *Eloquence* of the *Preacher*. But *Advocates* daily diſcourſe upon an infinite Variety of Subjects, and always invent new Arguments to confirm what they advance. They anſwer *Extempore* to the ſtudied Harangues of their Oppoſers; and altho they are involved in a vaſt Multiplicity of Affairs, they do yet handle every one of them as accurately as if that alone employed all their Thoughts; & ſo inſenſibly gain Ground upon each other by Turns, that he who ſpeaks laſt is always ſure to perſwade the *Audience* that he only is in the Right.

*Poetry* is intirely made up of Flowers and Graces, and imitates the Nature of *Flowers* in this, that it is neither laſting nor profitable: For after it has for ſome Time agreeably flatte-

red

red our Humour with it's fleeting and inconſtant Pleaſures, it ſuddenly diſappears, and vaniſhes into that empty Nothing from whence it came; neither procuring Riches to the *Poet*, nor affording Protection to his Friends.

What can be imagin'd more deſirable and more worthy of a great and generous Mind, than to deliver innocent Perſons from the devouring Jaws of their *Accuſers*, and to free them from their inſolent and haughty Oppreſſors; to inſtruct the Judges, and ſet Matters before them in a clearer Light; to charm the *Auditors*; to extricate and diſengage the Truth from all thoſe *Clouds* of Error and Darkneſs, and *Ambiguity* in which it is involv'd; to ſtrike Terror into the *Guilty*, and bring thoſe miſerable Wretches to the exemplary Puniſhments their Crimes do deſerve?

Theſe are the Perſons who pleaſe

and

and entertain us at the ſame Time, that we are amaz'd and terrified with the Thunder of their Voice. What Man can forbear trembling and turning pale, when he hears them plead againſt him with ſo much Force and Vigour? None of the *Auditors* any longer remains Maſter of his own Paſſions; and 'tis impoſſible for them to command theſe ſudden Tranſports and Emotions of their Souls: No man is himſelf, but intirely depends on the *Breath* of the *Orator*, and hangs upon his *Lips*. He gently leads his *Audience* whitherſoever he pleaſes, and, by the *Weight* of his *Eloquence*, inclines the *Ballance* of *Juſtice* to his own Side. Add to this, that *Lawyers* have the nobleſt Subjects to exerciſe their Wit and Invention while they are employed in the accurate Search and vigorous Purſuit of Truth through all the retir'd and hidden Paths and the winding

winding *Mazes* and *Labyrinths*, in which it is involv'd; while they draw Topicks and Arguments from the inexhauſtible Fountain of their own Invention, and form them by their Judgement, and give them a handſome Turn; comparing Things of the ſame Nature together, and *Contraries* with their *Oppoſites*.

The Dignity of their Profeſſion appears from the handſome Commendations, which the Emperors *Leo* and *Anthemius* are pleas'd to beſtow upon them.

'*Advocates* (*ſay they*) (*a*) who determine the doubtful and uncertain '*Fates* of *Cauſes*, and by their bold 'and vigorous *Defences* maintain and 'ſupport both publick and private 'Affairs, when they are in a bad and 'infirm Condition; do as effectually 'provide for the Security of Mankind, as

(*a*) L. 14. C. de Advocat, divers. Jud.

'as if they ſav'd their Country and 'Parents by expoſing their Lives for 'them in the Field againſt their Ene-'mies. For we do not look upon 'thoſe, as the only Perſons that fight 'under our Conduct, who defend us 'with their Swords and Shields; 'ſince *Advocates* alſo fight in our Be-'half, who, repoſing all their Confi-'dence in the invincible Power and 'Force of their *Eloquence* do vigo-'rouſly and glorioufly defend the 'Hopes, and Life and Poſterity of 'thoſe that are oppreſſed.

The *Schoolmen* imagine, the *Law* is not ſupported by Arguments but Authorities; and conſequently does not admit of any fine Reaſoning at all: But they are extreamly miſtaken; for there is no Science in the World that allows of more different Ways of arguing about it.

In *Theology* all that we know of God

God is ſo far ſhort of that infinite Being that it is dangerous warmly to debate about theſe Matters: For *God Almighty* has, by his inexpreſſible Brightneſs and Glory, ſo dazled the Eyes of weak and ignorant Mortals, that tho he himſelf beholds every thing, yet it is impoſſible for us to diſcover any Part of his Nature or Perfections.

*Naturaliſts* and *Phyſicians* can agree in nothing, but are perpetually ſubverting and denying each others Principles, and forc'd to rely upon contrary Experiments and uncertain Conjectures. *Mathematicians* do not diſpute but demonſtrate. And as for *Logick* and *Metaphyſicks*, the greateſt Part of thoſe things which are handled in them are trifling and impertinent; and ſo uſeleſs and unneceſſary to humane Life, that no Perſon in his Right Senſes will think them

worth his Pains : But the *Lawyer* derives his Principles from the pureſt Fountains of Senſe and Reaſon, which are of excellent Uſe and Advantage to Mankind, and extreamly neceſſary to humane Life. He draws his Arguments from long Practice and Experience, and debates what is agreeable to Right Reaſon, convenient for Mankind, and moſt directly tends to the Advantage of the Publick. He conſiders the *Conſtitutions* of other Nations, and diſpoſes the *Laws* of his own Country into ſuch an Order as is moſt convenient for his Purpoſe. And certainly ſince the twenty four Letters of the *Alphabet* produce ſo vaſt a Multitude of Words, what an infinite Variety may we expect from ſo great a Number of *Laws*, *Deciſions*, and *Circumſtances*, and their different Aſpect and Relation to each other : For altho there are a great many things eſta-

eſtabliſh'd in *Law*, and enacted by *poſitive Statutes*; yet no *Laws* or *Conſtitutions* can regulate and comprehend all poſſible and imaginable Caſes: And therefore both the *Judge* and the *Advocate* are obliged to extend them to thoſe which are of the ſame Kind and Nature.

The *Profeſſors* of other Sciences do hardly engage in Debates once in a Month; but *Advocates* daily and almoſt every Hour handle new and unheard of Arguments: Nor do they make their Harangues in private and obſcure Schools, and amidſt a Company of Boys and Children, but are ſurrounded in the *Courts* of *Juſtice* with Perſons of the higheſt Quality, and admir'd and applauded by a noble *Audience*: Nor are they encourag'd by an empty Praiſe, but liberally rewarded for their Pains; and by their warm and vigorous Debates they mu-

tually ſharpen and refine their Wits.

*A noble* Emulation *does them fire,*
*And adds aſpiring Wings to their Deſire.*

I am not ignorant that there are ſome *Lawyers* who affirm that *Eloquence* ought to be baniſh'd the *Courts* of *Juſtice*, becauſe, by its bewitching Charms, it byaſſes and corrupts the *Bench*, conſumes a great deal of Time, which might be more profitably employ'd and takes off the Minds of *Advocates* from a ſerious and ſolid Contemplation of *Law* and *Juſtice*, to a trifling and impertinent Nicety about their Words and Expreſſions.

'Tis true indeed in the *Roman Pleadings*, it was impoſſible for the *Lawyers* without the Aſſiſtance of *Oratory* to manage the Populace, and prevail with the rude and ignorant Multitude, whoſe Paſſions they were oblig'd to

raiſe

raiſe and inflame, in Order to effect their Deſigns. Beſides, at that Time, there were no fixed and eſtabliſh'd *Laws*, by which all Cauſes and Controverſies between contending *Parties* might be exactly determin'd: But all their Topicks and Arguments were taken from material *Equity* and *Juſtice*, without any Conſideration of *poſitive Law*; as any Man will eaſily perceive from the Strain of *Cicero's* Orations. But now the Face of Affairs is entirely alter'd; for by our *Laws* and *Deciſions*, good *Judges* are directed, and the bad reſtrain'd; and they are ordinarly Perſons, ſo advanc'd in Years, that they cannot eaſily be impos'd upon with painted and glittering Harangues.

To this I anſwer, that I do not approve of an empty and inſignificant *Eloquence*; nor of that which is forc'd and unnatural: When the *Orator* aban-

dons

dons his Arguments, and loſes himſelf among the *Flowers* and Ornaments of Speech; but it ought to be pure and cleanly, in which *Rhetorick* only furniſhes the *Law* a gentile and eaſy Dreſs; and juſt Senſe is delivered in Words that are proper and ſignificant, and apt to convince the *Auditory*. An *Eloquence* which is ſo far from rendering the Argument more confus'd and perplexed, that it rather tends to illuſtrate, and ſet it in a truer Light; in which an eaſy and fluent *Elocution* does happily embrace the Thoughts it expreſſes, and carries them forward in a gentle Courſe to their intended Purpoſe; ſo that the *Advocate* is neither at a Loſs how to expreſs himſelf, nor the *Judges* perplex'd with the Obſcurity of his Diſcourſe. The true *Sublime* never ſwells beyond its proper Bounds, but riſes with a natural Beauty, being great with-

without Excesſ and handſome without Affectation. Who can deny that even in the moſt grave and ſerious Subjects, proper and well choſen *Epithets* contain Arguments in themſelves, and that the moſt powerful Conſiderations are animated by them with a ſtronger Force? And altho I am no great Admirer of thoſe who mind nothing but Words, there are yet a great many Caſes in which the Truth depends not upon *Laws*, and the Authority of the *Doctors*, but may be gather'd from Circumſtances *Preſumptions*, and other probable Conjectures, in the managing whereof the *Orator*, exempted from the Rigour and Severity of the *Laws*, may uſe a florid and copious *Eloquence*, with a manly Freedom; provided he does not indulge himſelf too great a Licence. And then in arbitrary and uncertain Caſes, where the truth hangs doubtfully

fully, and is equally *ballanc'd* on both Sides, the reſiſtleſs Power and *Weight* of *Eloquence* is always ſure to determine the Matter. Beſides, a man may alſo be allow'd to ſpeak eloquently and copiouſly in thoſe Caſes, which were never debated before, and have not yet *ſuffer'd* a *Deciſion*; as alſo in *Political* and *Criminal Cauſes*, where a graceful way of ſpeaking is extreamly neceſſary, in Order to raiſe the Paſſions: And in fine, *Eloquence* is always agreeable, provided it be chaſte and eaſy. For as we would wiſh our Miſtreſs to be lovely and beautiful as well as rich and virtuous; and *Cæſar* accounted it the Part of a good Souldier to take Care of his Armour that it might always appear bright and unſullied, ſo we cannot chuſe but be pleaſed with a handſome Diſcourſe, and the Majeſty of it is always ſure to ſtrike Terror into the *Audience*. Beſides

ſides that *Eloquence* inclines the *Judges* to be favourable to the *Orator*, and ſo agreeably engages their Attention that it is impoſſible for any Part of his Diſcourſe to eſcape their Notice. We retain what pleaſes us, and thoſe things that delight and entertain us make a laſting Impreſſion upon our Minds. And ſince we are at ſo much Pains to provide beautiful Ornaments for the Decoration of our ſelves and our Houſes, not for Neceſſity but Pleaſure; why ought we not rather to indulge our *Genius*, and take ſome Care to adorn our Soul, that is the nobler Part, to which we owe a great deal more than to our Eyes and Senſes that are ſubject to its Command, and whoſe Perſpicacity requires a greater Accuracy and Exactneſs at our Hands, deſpiſing that which is vulgar, contemning what is mean,

and undervaluing thoſe things that are common and ordinary.

If we take a View of this glorious Fabrick of the World, we cannot but perceive a great many Things created for Ornament and Pleaſure, and if we conſider the ſacred Writ, we ſhall there meet with many ſurprizing Strokes of a ſublime and lofty *Eloquence*; the Stile of it being adorn'd with a great Variety of *Metaphors*, *Exclamations*, *Hyperboles*, and all the other Graces and Ornaments of Speech. Nor can there poſſibly be imagin'd a handſomer and ſublimer Diſcourſe than that which God himſelf makes unto *Job*, which by the Beauty and Majeſty of its *Diction*, at the ſame Time tranſports us with Pleasure, and ſtrikes us with Terror and Amazement. If we impartially conſult our own Breaſts, we muſt needs confeſs that we are taken with this

this Art; and therefore if we can be so happy as to render our selves Masters of it, we need not despair of captivating others, the same Way. And then the more suspected it is by *Judges*, the greater Care and Application ought *Advocates* to use in Order to attain it. For this Suspicion arises from an inward Sense of the Power of *Eloquence*, and a frequent Experience of its resistless Influence, and invincible Force; by the Assistance whereof the *Lawyer* is sure to prevail, and without which it is impossible for him to acquit himself handsomely on any Occasion.

But an Advocate must beware of employing his *Eloquence* about mean and trifling Subjects; for by this means, instead of exalting his Argument, he will only abase his Art. Nor ought he to affect too much Gaiety and Sprightliness of Humour in

grave and ſerious Matters; Since this would be as ridiculous as if a *Judge* or *Clergy-man* ſhould wear an effeminate or *Mimical* Habit, tho it were never ſo fine and ſumptuous.

Every Science has a Stile peculiar to it ſelf: That of the *Legiſlators* is ſhort and ſententious; whereas the *Orators* is copious and fluent. In *Moral Philoſophy*, there is frequent Occaſion for Sentences and Reflections, that ſo they may make the deeper Impreſſion upon the Minds of the *Auditors*, and be the eaſier convey'd and tranſmitted to Poſterity: But there is very little Uſe for them at the Bar. For it is not ſo much the part of an *Orator* to teach as to perſwade. But if it happens that they muſt of Neceſſity be us'd, we ought to beware leſt they be any way forc'd and remote from the Subject, and brought from too great a Diſtance; for this would argue

argue a ridiculous Affectation. Nor ſhould they be us'd by young Perſons; becauſe this has in it too much of Preſumption and Arrogance. And then there ought not to be too many of them, nor too near each other: For ſince they are only made uſe of to give a new and additional Beauty to a Diſcourſe, we ſhould maintain the ſame Order and *Decorum* in them that is obſerv'd in the *Patches*, that adorn the Faces of beautiful Women, which then only pleaſe us, when they are few, and at a juſt and proper Diſtance from one another.

'We muſt take Care, *ſays Petro-*
'*nius*, leſt theſe Sentences appear too
'much without the Body of our Diſ-
'courſe, but like the ſumptuous Or-
'naments of a well made Garment,
'they ſhould be handſomely inter-
'woven, and of a Piece with the reſt.

But

But there is sometimes as great Affectation in utterly despising all Sorts of Ornaments, as in the too gaudy Use of them; and as *Quintilian* excellently observes, "There are 'some Persons so affraid of aspiring 'too high and so apprehensive of fall-'ing, that they lye always low and 'grovelling upon the Ground.

And therefore we must sometimes bear with unusual Transports of the Soul, wherein *Nature*, breaking loose from all Manner of Restraint, takes Pleasure to show us how far she transcends all the *Art* in the World.

The *Definition* which *Cato* of old gave of an *Orator* was that an *Orator* is an honest man who has *Eloquence* to express his Thoughts. But now that the Body of the *Law* is increas'd to so great a Bulk, we must add that an *Orator* is an honest and *learned Man*, who is Master of a handsome Way

of

of ſpeaking. It is abſolutely neceſſary he be an *Honeſt Man*; for if a Speaker does not paſs for a Perſon of Probity and Virtue, People will be apt to disbelieve every thing he ſays. And ſince the main End of *Eloquence* is to *perſwade*, it is impoſſible for one to prevail upon his *Audience* whoſe Character and Reputation is ſo ſmall that that he does not deſerve to be believed. Now with what Face or Confidence can a Man go about to recommend Honeſty and Virue to others, when he is notoriouſly guilty of wicked and unjuſt Actions himſelf? And therefore an *Orator* muſt take particular Care leſt he advances any thing, which may leſſen his Character in the Opinion of grave and judicious Men, either by poſitively affirming what ſeems incredible, or by propounding any thing that is neither true, nor has ſo much as an Air of

Pro-

Probability. He muſt alſo beware of ſullying his Reputation by keeping too much Company with vitious Perſons, or too frequently and warmly undertaking their Defence. *God Almighty* who neither propoſes to us Virtue nor Religion without a Reward does uſually make the Succeſs of our Undertakings, in ſome Sort, anſwer the Sincerity and Uprightneſs of our Intentions; and the World is as apt to pardon the Miſtakes and Errors of *Honeſt Men*, as to be affraid of the Cunning and Treachery of the bad, even when they are really doing what is juſt and virtuous. We ought to have deep and laſting Impreſſions of *Juſtice* fixed in our Minds; and ſhould form an awful and venerable *Idea* of it. We may acquire Reputation without any great Pains, or Trouble; and Riches only as an accidental Acquiſition, but *Juſtice* is meerly

ly to be purſu'd upon its own Account, with our warmeſt Endeavours, and our cloſeſt and moſt vigorous Application.

Without an exact Knowledge of the *Law*, an *Advocate* is like a Souldier that wants his Arms, and his Harangues are nothing but an empty Sound; and as the moſt learned Man in the World cannot without this popular Sort of *Eloquence*, ſo neither can the moſt eloquent without this polite Learning make a handſome Figure in the *Courts* of *Juſtice*. He ought to make *Humanity* very much his Study; from whence he will exactly learn the Hiſtory of the *Law*, and be inform'd of the Manners and Cuſtoms of the ancient *Romans*. Let him frequently peruſe the *Body* of the *Civil Law*, which is the beſt and pureſt Fountain of *Juſtice* and *Eloquence*; and let him prefer the *Commentaries* that are written on that

Subject and the *Interpreters* of it to all others, neither over-loading his Memory with the voluminous Authors of Treatiſes and *Expoſitions*, nor diſtracting his Judgement by the tedious Writers of *Controverſies* and *Cuſtoms*. For ſound Reaſon, provided it is not weaken'd by too much Speculation, or wearied and exhauſted with too much Study, will eaſily make up and ſupply what is wanting in reading. While others peruſe *Hiſtories*, let a *Lawyer* read *Deciſions*; when they entertain themſelves with *Poems*, let him read over the *Pleadings* of the *Bar*: And ſo by an eaſy and agreeable Change of his Studies, let him gently unbend his Mind, when it is loaded with the Weight and Multiplicity of his Affairs.

An *Advocate* ought always to have beſide him, and ſhould carefully peruſe that excellent Book of *Bertochinus*

*Tuſcus*

*Tuſcus*, and other *Indexes*; but yet he muſt beware of truſting too much unto them; for he who is only learned by his *Index* does not deſerve the Name. This ſervile and precarious Knowledge neither furniſhes a Man Subject and Matter of Thought, nor enables him to make a ſudden and pertinent Reply; altho true and ſolid Learning is both the *Orator*'s Ornament and Defence. And yet theſe Perſons are certainly in the Wrong, who fill their Writings with long and tedious *Citations*; eſpecially thoſe who ſo unconſcionably crowd them into their Diſcourſes that they become perfectly flat and inſipid, and can never pleaſe any Man, who has a true and natural Taſte. This is a Fault whereof young People are very apt to be guilty, who, coming warm and heated from their Studies, nor having yet attain'd ſufficient Experience

of the World, or any Knowledge of *Deciſions*, and being utterly ignorant of the Way of deducing Arguments from the Nature of the Thing, from the *Analogy* and Agreement of the *Municipal Laws* with thoſe of other Nations, and from the like Caſes and Circumſtances, do utter undigeſted thoſe things they have laſt met with in their reading.

I am a great Admirer of the *French Pleadings* which are written in their *Native* Tongue, but with all the Beauty and Elegancy of the ancient *Romans*. And yet Foreigners generally find Fault with their frequent *Citations* of the *Fathers*, and the *Claſſick Authors*; for this is certainly to no manner of Purpoſe, and ſignifies nothing to the *Judge*. Nor will ever St. *Auſtin* gain the Point where *Ulpian* ought to have prevail'd.

Young *Advocates* are alſo in the

Wrong

Wrong when they trust more to *Law* than to *Matters* of *Fact* in the *Causes* they plead; fondly imagining that while they only urge *Facts* and Circumstances, they handle too mean a Subject, and therefore they move a great many Things that are very impertinent, and altogether foreign and remote from the Purpose; and behave themselves with a great Deal of Learning, but little Sense, discovering indeed the Vastness of their Reading, but at the same Time betraying the Weakness and Insufficiency of their Judgment. But in *Cicero*'s *Pleadings* we find that great *Orator* is very careful and exact in enumerating every particular Circumstance, and endeavours to represent them in their true and proper Colours. In his *Defence* of *Milo*, he descends with a happy Care and a necessary Curiosity into the minutest and most inconsiderable Matters

ters, and takes Notice of his putting off his Shoes, his changing his Habit, and his Lady's dreſſing her ſelf with the utmoſt Care and greateſt Leiſure, without omitting the numerous Retinue of Waiting-Women and Muſick-boys that attended them.

From all which, he takes Occaſion to inſinuate to the *Judges* that *Milo* could not poſſibly have contriv'd the Death of *Clodius*, or ever meditated his Ruine. And in this Point *Orators* imitate *Painters*, who dwell upon every Hair of the Head, and gain a juſter Reputation by a lucky Reſemblance of Nature, than they can reaſonably expect from the Brightneſs of their Colours.

As every Man has a particular *Genius*, ſo he has alſo his own Stile; and it is very uſual for us to recommend that as the beſt to others to which our own Nature and Inclination lead and determine

determine us. And this is the moſt proper Reaſon that can poſſibly be aſſign'd why ſome only commend that which is full, and round, and copious, and others extol both by their Applauſe and Practice that Stile which is more nervous and exact.

For my Part, I would not ſtrive againſt my *Genius* in conforming my Stile to that of another Perſon; we are much more hurted by this Force which is impos'd upon us, than aſſiſted by the *Shadowing* and Imitation of the fineſt Copy in the World. They who are in Hopes, that by Imitation their Wit and Invention may be improv'd, do with ſome Colour of Reaſon make a Doubt whether we ought always to propoſe to our ſelves theſe Authors which our own Genius moſt inclines us to follow: Since it is eaſier for us to comply with their Stile, and the Paſsage from our Nature

to

to theirs is readier and ſmoother; and I am Inclin'd my ſelf to be of this Opinion. But when we are apt to be led into any Exceſs, and are ready to write a Stile which is either too conciſe or too copious, in this Caſe we ought to turn our Thoughts and Attempts that Way which is moſt contrary to our natural Inclination: And therefore thoſe who are in Danger of falling into the Obſcurity of *Lipſius* ought to peruſe *Cicero*, and they who write a round and flowing Stile, like that of the *Roman Orator* ſhould ſtudy *Lipſius*. But after all we ought to conſult our Friends upon this Head, and deſire their Opinion about the Faults of our Stile, that ſo we may retrench all the unneceſſary Superfluities and Excreſcencies of it, and make up its Deficiencies and Wants, before they grow into Habits, and by gaining too much upon us be

not.

not so easily remov'd: For no Man can judge of his own Affairs exactly or impartially: *Nec sensus super sensorium sensationem producit*; as *Philosophers* love to speak that is, *every Sense requires an Object distinct from it self.*

But, abstracting from all Consideration of that which is peculiar to any particular Person, a diffus'd and copious Stile seems, in my Opinion, to be fittest for pleading *Causes*, and most proper to *perswade*. And this the *Romans* recommend unto us by their own Example, and was particularly the Judgement and Practice of *Tully* in this Matter.

And therefore lest *Advocates*, too fond of this Stile, and too much indulging this fluent Strain, should exceed all Bounds and Limits, *Pompey* (who was the first that attempted to lay a Restraint upon the Exuberancy of *Orators*) allow'd the *Accuser* only

two Glaſses, and the *Defender* three. That which is long (as *Phalerius* ſays concerning *Elocution*) has always in it ſomething which is great and Majeſtick: And thus we find that among the Writers of the *Epick-Poem*, and with *Architects*, in their moſt auguſt Palaces, every thing they deſign to be more conſpicuous than the reſt, is large and bulky. Add to this that our Bodies are ſo made and fram'd by Nature, that the biggeſt and largeſt are always ſure to be the ſtrongeſt too. And as frequent and repeated Stroaks, both by their Force and Number ſoon render the hardeſt Iron ſoft, and ductile; ſo a great many handſome Expreſſions, altho they may tend much to the ſame Purpoſe, do mightily ſoften and incline the *Judge*. For it is not a conciſe and ſhort Way of ſpeaking, but that which is round, and lofty, and magnificent, which roars

and

and thunders, and bears down all that oppoſe it. What at firſt eſcap'd the Notice of an inadvertent *Judge*, a handſome *Repetition* will make up and ſupply: And if the *Orator* did not gracefully enough expreſs himſelf in his firſt Attempt, it may be, he will ſucceed more happily in his ſecond.

We ought alſo to alter the *Phraſe*, and uſe different Turns of Expreſſion; not only in order to gain the Applauſe of the *Audience*, but that their Senſes which are ſo often ſtruck in the ſame Part, and ſo much wearied and fatigu'd may be ſomewhat relieved by this pleaſing Variety and agreeable Change. And thus *Figures* and *Metaphors* were only at firſt introduced to gratifie the Senſes and pleaſe the Ear. But tho in *Poetry* we are wont to make uſe of them with a great deal of Freedom, even to Exceſs and *Wantonneſs*, yet we muſt of Neceſſity be more ſparing of 'em at the *Bar*,

which is deſtin'd for grave and ſerious Affairs. And yet he who is too nice and ſcrupulous in this Matter, and unhappily confines himſelf to too narrow Bounds, is always ſure, either to ſuppreſs ſomething that ought to be told, or to darken and obſcure that which he ſpeaks: Whereas he who only falls into the Inconveniency of ſaying too much, expoſes every Thing in its proper Colours to the View and Conſideration of the *Bench*; and it is certainly much eaſier for the *Judge* to chuſe what he thinks beſt out of thoſe Particulars the *Advocate* propounds unto him, than to gueſs and form probable Conjectures of theſe Things which are omitted and ought to have been ſaid. This Exuberancy of Wit and Fancy is the Fault of a happy *Genius*, and a copious Invention: And this fruitful Soil, which without any Induſtry of the Husband-Man

does

does of it ſelf produce ſo plentiful a Crop of Weeds and Thiſtles, when once it is carefully manur'd and labour'd by ſome skilful Hand, will fully reward all his Pains, and abundantly anſwer his largeſt Hopes and Expectation. And therefore one, who makes *Eloquence* his Study, muſt, above all things, endeavour to attain a copious and flowing Stile, which afterwards he will learn to adorn and correct with greater Eaſe and Advantage. For nothing is more natural than firſt to provide Materials, and then to poliſh and refine them, in Order to make up excellent Work. And I have known ſome Perſons, who, without any nice Choice or Propriety of Words, and any Care about the agreeable Ornaments and Graces of Speech, by a fluent and ready Stile, have acquired the Reputation of *Orators*; whereas thoſe who are too ſollicitous about the

Choice

Choice of Words, while they are in Pain to find them, do frequently make ſo great a Stop in their Diſcourſe that they often paſs for impertinent Bunglers: For our Attention inſenſibly abates and grows cold and indifferent by Degrees, when it is not continually ſuſtain'd and ſupported. But he only deſerves the Character of a compleat and accompliſh'd *Orator*, who, by weighty & ſignificant Words, not too vulgar or commonly us'd, by harmonious Periods that are always equal among themſelves, and a flowing Stile ſo much entertains and charms the *Judges* that he inſenſibly engages them in his Intereſt, and gains their Approbation and Applauſe. And yet an *Orator* ought to change his Stile, according to the Difference and Variety of Subjects he may have Occaſion to handle: In the Beginning and End of his Diſcourſe he ſhould be more

more full and copious; in propounding his Argnments more ſhort and conciſe; and as *Cicero* excellently obſerves, "He is truely eloquent, 'whoſe Stile, in diſcourſing of *mean* 'Subjects, is fine and handſome; in 'treating the *Great*, grave and Majeſtick, and in handling ſuch as are of 'a *middle Nature*, neither riſes too 'high nor ſinks too low.

Altho a conciſe Stile is proper for the *Deciſions* of the *Bench*, and a more diffus'd *Diction* is fitter for the loud *Pleadings* of the *Bar*, yet, in my Opinion, an accompliſh'd *Orator* ought to aim at an abſolute Command of both: Which if he is once ſo happy as to attain, he ſhall be able to reduce his wandring *Adverſary* to a preciſe Point of *Law*, and confine him (if I may ſo ſpeak) within a *Magical Circle*; and, on the other Hand, if his *Oppoſer* is a cloſe and pointed Speaker, he ſhall be

in

in Condition powerfully to bear down and oppreſs him by the Exuberancy of his Diſcourſe, and will eaſily oblige him to abandon thoſe narrow Bounds to which he had confin'd and reſtricted himſelf. This double Stile is extremely neceſsary to an *Advocate*; becauſe by the one he is able to extricate himſelf from any Strait to which he may poſſibly be reduc'd, and by the other to involve his *Adverſary* in Difficulties, as he ſees Occaſion.

If I were going to plead at the *Bar*, after I had taken an exact View of the *Matter* of *Fact*, and duely weigh'd and conſider'd all the *Circumſtances* of it, by which Actions are ſet in different Lights, and appear with various Aſpects, as Faces ſuffer a ſenſible Alteration by their different Lineaments, and Features; I would have Recourſe to my own Fancy and Invention

vention, before I conſulted any Books upon the Head. For they who at Rights betake themſelves to Books, render their *Genius* ſo lazy and unactive that for the future they ſhall hardly be able to furniſh themſelves one ſingle Argument out of their own Head. And if I had a fit Opportunity, I would try the Force of my Arguments either with my Adverſaries or Aſſiſtants; and when I had invented any Topicks for a Debate, and read as much upon the Subject, as I thought ſufficient for my Purpoſe, I would take another View of the whole, and conſider it a ſecond Time. After this I would write down a Plan or Scheme of my whole Diſcourſe, that ſo, upon mature Deliberation, I might know, if my Arguments, thus expos'd to View, were ſufficiently form'd and digeſted, and diſpos'd in a right Manner, to which afterwards I would give the

laſt Stroak, and finiſh in ſuch a Stile and Method as I thought moſt proper and convenient for 'em: And altho I would never confine my ſelf to a cloſe and ſervile *Repetition* of what I had thus written, yet I would write them down as exactly as if I reſolv'd to repeat every Word. But nothing does more animate an *Orator* than a firm Perſwaſion of what he ſays, and a hearty and entire Affection for his *Client*, and his *Cauſe*. From theſe Sources I have often ſeen impetuous and reſiſtleſs Torrents of *Eloquence* break forth, which overturn'd every thing that oppos'd them, by their rapid Courſe; inſomuch that their violent Shock could hardly be ſuſtain'd by thoſe who at other Times were wont to be pretty equal to them. For, by this friendly *Warmth*, an *Orator* is ſo nobly *enflam'd* that he excites *Light* to himſelf, and at once confounds

founds and *conſumes* his *Adverſary*.

The Parts of a Diſcourſe, according to the *Modern* Way of *Pleading* are only the *Preface*, the *Narration*, the *Diſpoſition* of the Arguments, the *Confutation* of thoſe of our *Adverſary*, and the *Concluſion*. *Prefaces* are never us'd at the *Bar*, but in the moſt conſiderable *Cauſes*, and are the ſame thing to a Diſcourſe, which a *Porch* is to a Palace; and as a large *Portico* before a ſmall private Houſe would be very ridiculous; ſo one who ſhould go about to prefix a ſolemn *Preface* to a mean and inconſiderable *Cauſe* would certainly expoſe himſelf. But for the ſame Reaſon we ought to beſtow a great many Beauties and Ornaments on *Prefaces* as we do upon *Porches*, altho thoſe are never pleaſing or agreeable that are taken out of common Places, but which naturally ariſe from the *Cauſe* it ſelf, as the Flower

ſprings upwards from its Root. And ſometimes it very luckily happens for him who *anſwers*, that he may naturally take his Preface from his *Adverſary's* Harangue. In which Caſe, as if he ſpoke *Ex tempore*, and without any Thought or Preparation, he will make the *Judges* conceive a mighty Opinion of the Sprightlineſs of his Fancy, and the Sincerity of his Diſcourſe. In Order to begin an Harangue in an agreeable Manner, I would think it proper to compoſe and finiſh the whole Diſcourſe, before I attempted the *Preface*; that ſo upon a full View and Survey of the *Cauſe*, I might chuſe ſuch a Way of beginning it, as were moſt eaſy and natural, and would beſt pleaſe my *Auditors*. For they who firſt employ their Thoughts in compoſing the *Preface* (as almoſt all *Advocates* are generally wont to do) are very apt to begin their Harangues

rather

rather in a florid than a natural Way. The Buſineſs and Deſign of the *Preface* is to avert and carry off the Anger of the offended *Judge*, which may poſſibly be occaſion'd by ſome unjuſt Reproach, or malicious Imputation; to blunt the Edge of Envy, when it is pointed and ſharpen'd by wicked and abominable Arts; and in ſhort to gain his Eſteem and Affection by making your *Client* appear in a true Light, and expoſing your *Adverſary* under a Diſadvantage. When the *Narration* is long, the *Preface* muſt be ſhort, and ſo proportionably, when the contrary happens; altho the Beginning muſt always be in ſome Meaſure accommodated to the Reſt of the Diſcourſe; leſt otherwiſe the *Head*, by its prodigious Bulk, ſhould render the *Body* monſtrous and unwieldy. If more *Advocates* than one plead upon a Side, he only, who ſpeaks firſt

ſhould make uſe of a *Preface*. And when the *Judges* are already wearied with their *Preambles*, if their Adverſaries alſo uſe them, they will mightily offend the *Bench* by ſo *nauſeous* a *Repetition*. To this may be added that thoſe who debate in Behalf of the ſame *Client*, and bear their Parts together in the ſame *Cauſe*, ought always beforehand to compare their Arguments, leſt otherwiſe, by contrary ones, they cut each other's Throats: For they only plead to the beſt Advantage who ſeem to have all the Variety of two Perſons, and the Harmony and Agreement of one.

After the *Preface*, follows the *Narration*, which propounds and repreſents unto us the *Matter* of *Fact* adorn'd and defended by all the Circumſtances and Colours that the Nature of it will permit or allow. In which the Strength of Judgement more

more conſpicuouſly appears than the Force of *Eloquence*. And yet it is not requiſite that Truth be repreſented in ſo plain a Dreſs, as intirely to be diveſted of all the Charms and Advantages of a handſome *Diction*: For the *Narration* does not proceed from a diſintereſsed *Witneſs*, but one who is *Patron* of the *Cauſe*. But the *Eloquence* that is proper to *Narrations* is ſuch, as by it the *Orator* makes thoſe Things ſeem to be preſent and viſible which are abſent and already paſt; inſomuch that the *Auditors* do not imagine they hear, but ſee with their Eyes what he relates. And this plainly appears in the *Pleadings* of *Cicero* againſt *Verres*, which are the beſt Models and Patterns in the World of juſt and natural *Narrations*. An *Advocate* may here alſo be allow'd by an agreeable Sprightlineſs and Vivacity of Fancy to relieve the Minds of the

*Judges*

*Judges*, that are apt to be wearied by a tedious Relation. We ought to dwell upon these Points which strengthen and confirm our *Cause*: And we shall certainly be Fools to our own Interest, if we do not omit and pass by those which hurt us, when there is no Possibility of lessening them by any Colours, we can put upon 'em. And yet a frank and voluntary *Confession* of those things we know shall be prov'd against us will very much extenuate our Guilt, and gain the Favour of the *Judge*: And therefore I think it more adviseable to answer them by Way of Prevention and Anticipation of the Charge, than entirely to hide and conceal them. As *Prefaces* are not always us'd, because many, who dare not trust to their *Eloquence*, do presently begin with the *Narration*, so when the Business in Question, or the principal Subject of

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the Controverſy is confin'd to a particular Point of *Law*, and propounded as a *Poſition* by the *Judges*, the *Narration* is not neceſſary, unleſs there is ſome Circumſtance, which may poſſibly conduce to the Illuſtration of it. And in this Caſe we may be allow'd to paſs by thoſe *Matters* of *Fact* that tend to the Prejudice of our *Cauſe*. But then if the *Judge* do not propoſe the State of the Controverſy in an expreſs Form of Words, an *Advocate* ſhall the eaſier gain his Point, and fall into the fewer Inconveniencies, by how much the ſhorter and conciſer Way he takes of propounding the *Caſe*. And therefore I am extremely pleas'd with the Method of thoſe, who before they adduce their Arguments, do ſo free and diſengage the State of the Controverſy from all Objections or Difficulties they may probably encounter, by yielding every

Thing that can be granted, and removing all the Doubts that might trouble and incommode them, that they leave Nothing to be urg'd which can ſignifie any thing to the Purpoſe, and luckily prevent and anticipate all that their *Adverſarys* can poſſibly object.

We muſt paſs, by an eaſy *Tranſition*, from the *Narration* to the *Arguments*: And altho many affirm that only one or two weighty Arguments ought to be propounded, becauſe they place Truth in one ſingle Point which, they ſay, we ſhould only urge; yet I am of Opinion that no Topicks ought to be omitted which do any Way tend to the ſtrengthening and illuſtrating of our *Cauſe*.

For where many *Judges* ſit on the *Bench*, Variety of Arguments may probably have different Effects upon them, and that which to the *Orator* ſeems

ſeems weak and inconſiderable, and on which he lays very little Streſs, may yet chance to prevail with ſome of the *Judges*. And this ſeems to have been the Opinion of the younger *Pliny*, who in his twentieth Letter introduces *Regulus* and himſelf thus debating the Matter. "You, ſaid, '*Regulus* unto me, urge every Point 'and Circumſtance which you imagine may ſerve your Turn; I preſently ſee the Throat of my Adverſary, and thither I direct my Stroak: 'I anſwer'd him it might happen 'that he ſhould light upon the 'Thigh, or the Knee, when he fancied himſelf ſure of the Throat. 'But I, who cannot ſo eaſily diſcover 'the Throat, do aim at every Part 'of the Body. For the Tempers and 'Diſpoſitions of *Judges* are as obſcure 'and cloudy, as deceitful and uncer'tain, as the moſt boiſterous Storms

and Tempests. I shall add one Observation which Use and Experience, the best of Masters, have taught me to make, that hence it happens that those who at the same Time take Cognizance of the same *Cause* do often entertain the same, and frequently contrary Opinions; and yet are induc'd to think so, from different Motives and Considerations.

We ought as much as possible to avoid too frequent *Repetitions* in our Stile, and, in the *Invention*, a trifling and impertinent Heap of insignificant Arguments. For those who are too talkative extremely vex and incommode the *Judges*, and by too nice and scrupulous *Distinctions* do weaken and enervate the Force of their Reasoning. They who too much divide their Arguments, from deep ones render them weak and shallow; as Rivers

cut

cut out into many Streams and Branches become quickly fordable and loſe their Depth. To this may be added that *Judges* are very apt to ſuſpect the Validity of their Arguments, when they diſcover many of them that are not *concluſive*; as *Merchants* are not eaſily, for the future, inclin'd to believe thoſe who have formerly deceiv'd them with bad Commodities and corrupted Wares. An *Orator* ought therefore to dwell and inſiſt upon theſe Arguments which are forcible and *concluſive*, and as for thoſe that are weaker and do not ſo well *conclude*, he ſhould only offer them tranſiently, and by the *Way*, or add them to thoſe which are ſtronger; that ſo theſe may bear down in Conjunction with the reſt, which by their own Weight are of no Moment or Conſideration. But then theſe weaker Arguments ought to have ſome

Affinity

Affinity with thoſe which are more valid; as an *Unite* increaſes the Number, and enhances the Bulk: For otherwiſe, if they be not deduc'd by an eaſy and natural Conſequence from the Subject-Matter of the Diſcourſe, they will produce Nothing but a meer *Chimera* by their imaginary *Conjunction.* And yet if I had a ſtrong and unanſwerable Argument, I would truſt to it alone, and not propound any other, leſt my *Adverſaries* ſhould by this Means find more Matter of Diſpute and a larger Field of Controverſy: I would frequently urge and repeat it; that ſo by this Confidence and Aſſurance I might enhance its Value. But there are ſome, who, to gratifie their own Vanity and Humour, tranſgreſs their Bounds, being more concern'd to acquire an empty and inſignificant Applauſe to them-

ſelves, than to gain an honourable and uſeful Victory to their *Clients*.

I am not at all pleas'd with the Method of thoſe who pour forth and diffuſe all their Arguments without any Diſtinction in one continu'd Harangue. And yet this may be neceſſary, when the Diſcourſe is jointly made up of *Preſumptions* and *Authorities*; in the managing whereof the *Orator* inſenſibly paſſes from one *Preſumption* to another. The marking and dividing of all the Particulars of an Harangue, by the *Diſtinctions* of *firſt* and *ſecond*, denotes their Number, and confirms the *Judge*. But the reducing of them into *Syllogiſms* is neither poſſible nor agreeable to the Nature of *Rhetorick*; an *Induction* of particulars and *Enthymems* being infinitely more accommodated to it. For generally all the Arguments of *Orators* are only inſtead of a *Subſumption* or the *minor*

*Pro-*

*Propoſition*, as appears in *Falſhood*, and other Crimes. But if one Argument is eminently ſtronger than the reſt, in Order to render it more *formal*, it may be reduc'd into a *Syllogiſm*; and juſt ſo every thing that has been already ſaid may be recapitulated in the End of the Diſcourſe, and put into a *Syllogiſm's Form.*

The Force of the *Orator's* Genius does as much appear in the *Diſpoſition* as in the *Invention* of the Arguments, inſomuch that there are ſome who by this one Quality have as much the Advantage of others as the moſt learned Men in the World have of the moſt ignorant. For Arguments that wander out of their proper Place are like Souldiers who deſert their Colours, or are diſorder'd and put out of their *Ranks*. Every Man contrives to himſelf ſome Method in the *Diſpoſition* of his Arguments; but for my

Part

Part I am beſt pleas'd with that which Nature has invented and Experience confirm'd; namely that whereby thoſe Arguments are propounded in the firſt Place which clear the Snbject of the Cotroverſy, and illuſtrate the Nature of it. From this I would paſs to the *Laws* and *Citations*, that ſo I might urge thoſe Things laſt which, I thought would moſt incommode my *Adverſary*. And in all theſe I would proceed from the weaker Arguments to thoſe that are ſtronger and more valid: For it is natural that every thing by growing and advancing forwards ſhould acquire new Strength; and the *Judge* who has already heard thoſe that are forcible, deſpiſes theſe which are more infirm; whereas on the contrary a Man never languiſhes who is always in Hopes that the beſt is yet to come. Beſides, that theſe Things

which are urged in the laſt Place are always ſure to make the deepeſt and moſt lively Impreſſion: For theſe Arguments that are firſt propounded, as it were by a new *Superinduction* are in a great Meaſure effac'd and obliterated by the laſt. And therefore *Phalereus* gives us this Advice, that we ſhould not ſeem to grow weak and faint by deſcending from a ſtronger Argument to one that is more infirm: Nor does *Nature* here need to be ſupported by *Authorities*. But when Arguments have a very near Reſemblance and Affinity with each other, I would chuſe rather, upon this Account, to join them together; and when one is the Foundation upon which the other is grounded, and prepares the Way for it, in that Caſe, I would adduce them according to their natural Order. And yet *Cicero* was of Opinion that the ſtrongeſt Arguments

ments ſhould be propounded in the firſt Place, provided that theſe which are equally good and valid be reſerv'd to the End of the Diſcourſe; thoſe of a middle Size being thrown into the Heap and Body of it. And indeed this is then moſt neceſſary, when an *Orator* makes his firſt Appearance at the *Bar*: For by this Means he may have the Advantage of prepoſſeſſing the *Bench* in his Favour; or elſe when the *Cauſe* is *unpopular* and lies under ſome ſcurvy Imputation; that ſo by a powerful Argument he may preſently bring over the *Audience* to his own Side.

In returning an Anſwer to the Arguments of our *Adverſary* the *Replyer*, among us, does in the Beginning of his Diſcourſe faithfully repeat all the Arguments of his Oppoſer, before he enter upon the *Confutation* of them. And he, who in his Anſwer

to the Arguments of his *Adverſary* endeavours to leſsen their Force, does plainly diſcover to the *Audience* that he is either ignorant or affraid of the Validity of them. But yet in the Return we make to our Oppoſer's Arguments we may be allow'd to diſtribute them into ſeveral Ranks, and cunningly to diminiſh their Number by reducing them to fewer Heads. We may alſo change their Order, and anſwer that Argument firſt, by which a *Reply* to the ſubſequent ones may be made with the greater Advantage, altho our *Adverſary* did not urge it in the firſt Place. There are ſome who ſeem to deſpiſe thoſe Arguments whereof they are moſt affraid, and to applaud and dwell on the *Confutation* of theſe, whoſe Force they are ſure of eſcaping: But I do not approve of ſuch a Piece of Diſingenuity, and am not pleas'd with theſe Artifices, be-

cauſe

cauſe of the extreme Hazard and Danger that attend them; ſince a wiſe and ſagacious *Judge* will eaſily detect them to the Dishonour and Diſadvantage of our ſelves and our *Cauſe*.

Theſe *Digreſſions*, call'd by *Quintilian*, *Egreſſions* are now grown out of Uſe, which were yet look'd upon by the *ancient Orators*, as the greateſt Ornaments of their Diſcourſe. Nor if we were pleading in *Defence* of the *Poet Archias*, would we be allow'd, with *Cicero*, to make an Excurſion upon the Praiſes of *Poetry*. For the *Judges* would ſoon oblige us to return to the Subject of the Debate, and our *Audience* ridicule us as impertinent Tranſcribers of *Common-Place-Arguments*. But altho before, we enter upon the *Arguments*, we may be allow'd to add to the *Narration*, thoſe Things which may properly be ſpoken in Commendation of our *Cauſe*, that by this Means we

may

may ſomewhat diminiſh the Severity of the Charge, and ſo engage the *Judge*'s Favour, as at leaſt to obtain a patient hearing; yet theſe Reproaches, which our *Accuſer* may poſſibly deſerve, and we ſufficiently incline to to throw upon him, (if they are neceſſary to our *Defence*, and relate to the Subject of the Controverſy) are not yet, in my Opinion, to be beſtow'd upon him, till ſuch Time as we have fully deduc'd, and made good all the Arguments that can be offer'd on the Head. For we ought hardly to be permitted to *impeach* our *Accuſer*, when we have not yet clear'd our ſelves from the Suſpicion and Imputation of theſe Things, which, in his Accuſation, he has laid to our Charge: Nor can we have the Face to defame that Perſon, with ſuch Vigour and Boldneſs as is neceſſary upon thoſe Occaſions, whom we

have

have not yet convicted of a falſe *Accuſation:* Whereof we have an Inſtance in that ſharp and ſevere *Pleading* of *Demoſthenes* againſt *Æſchines*.

When the *Orator* comes to the *Epilogue* or Concluſion of his Diſcourſe, he may then ſecurely rely on the Aſſurance he has of the Validity of his Arguments, and not, as in the *Preface*, beſeech and intreat the *Bench* in a humble Srain: But now being ſure that he has the *Law* upon his Side, he may uſe all his Endeavours to gain the Favour and Affection of the *Judge*. Here then is a large Field of *Eloquence*; here one may employ all the moving Graces, and agreeable Ornaments of Speech. What was before firmly eſtabliſh'd by the Authority of the *Laws*, may here be handſomely but briefly repeated; and thoſe Things which before were ſpoken ſeparately, may now be collected into one Body,

that

that ſo by this Union and Conjunction the Force of the Arguments may be increaſed. Here we may take Occaſion, to put the *Judge* in Mind of the great Inconveniency which the granting of our *Adverſarie's* Requeſt will derive on the Publick; how much the Intereſt of the Common-Wealth is concern'd that this Buſineſs be determin'd in Favour of our *Client*, and what is the Opinion and Expectation, both of the Learned and the Vulgar concerning this *Cauſe*.

In theſe *Prefaces* and *Epilogues* an exact Equality of the Periods, and an agreeable Harmony and Juſtneſs of the Cadence may even in our Age be obſerv'd; but in urging or confuting Arguments, the Caſe is very much alter'd: For the *Ancients* pleaded by *Eloquence* and *Preſumptions*, but we do it with *Reaſons* and *Citations*. And as Souldiers in the Hea[illegible] and

and Fury of the Engagement are apt to forget their Ranks; so we finish our Arguments and render them forcible rather by the Equality of the Subject than of the Period, and throw off our *Rhetorick*, as we use to remove the *Tramel* from our Horses, by which we taught them to amble, when once we are enter'd upon our Journey.

How much an *Orator* is recommended by an agreeable Behaviour and a just Way of accenting his Words may easily be perceiv'd from the Success and Applause which *Actors* meet with, who make a handsome Figure on the *Stage*; insomuch that they lead the Affections of their *Audience* whither they Please, and with the greatest Ease in the World raise all the Passions, and Emotions of the Soul. And since the *Harp*, by its agreeable Melody, is able to soften and compose

the unruly Paſſions of a diſtracted Mind, what may we not reaſonably hope from this living and animated *Muſick*, ſo nearly related to the Soul it ſelf? For *Souls* are eaſily fir'd with each other, as *Light* is by *Light*. So that an *Orator* ought to form his Words and Geſtures in ſuch a Manner as may be ſuitable to the ſeveral Paſſions of the Mind of Man, and by this lively Behaviour animate and inſpire his Diſcourſe. And yet he muſt remember, it is an *Orator* who ſpeaks, and not a Player or an *Actor*. For it is unbecoming an *Advocate* to burſt his *Lungs*, and weary the *Judges*, or by a furious Way of crying and bawling, like a Mad-man, or a barking Dog, to throw off all Humanity, and Senſe, and Judgement. For who can believe that theſe Things proceed from a calm and composed Mind, which are ſpoken by thoſe who behave themſelves

ſelves like Mad-men and *Enthuſiaſts*?

An *Advocate* muſt alſo take Care that he be not fir'd with the ſame Warmth and Ardour from Money as from Juſtice: For this is in Effect to hire out our Anger and Reſentment. But then in my Opinion, thoſe do as much deſerve to be blam'd, altho for a different Miſtake, who are neither capable of moving others, nor ſuitably affected themſelves, but plead with a cold Indifference, and in an inſenſible Manner. For the *Audience* is apt to believe, *that* Perſon is neither perſwaded of the Truth of what he ſpeaks, nor concern'd about the Event and Succeſs of the Affair, who does not at all ſeem to be mov'd with what he ſays. And then a Man's Geſture and Behaviour, paſſing through the Eyes into the Soul, does powerfully excite the like Paſſions in it: For one uſes a double *Eloquence*

that pleads at once both with Mind and Body. Beſides, a proportionable Degree of Warmth and Ardour diſſolves the *Orator's* Spirit and baniſhes Fear, that cold and frozen Paſſion; and upon theſe expanded and aſpiring Wings, the Soul flyes to immortal Fame. Add to this that the Voice of the *Orator* ought to be ſuited and adapted to the ſeveral Parts of his Diſcourſe. Points of *Law* ſhould be gravely urg'd: Theſe Things which are ask'd, either in the Beginning or End of our Harangue, muſt be expreſs'd in a humble and ſubmiſſive Strain; and thoſe which are to be narrated ſhould be pronounc'd with a middle *Tone*. Things that are to be ask'd require a low and ſubmiſſive Voice; and theſe which are to be urg'd demand a louder Pronunciation. The Beginning of our *Diſcourſe* ought to be deliver'd with a grave

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and ſubmiſſive *Tone*, except in theſe Things which in Order to rouſe and excite our *Auditors*, in an unexpected Subject, do ſometimes require ſudden and ſurpriſing *Exclamations*. And then it is the Buſineſs of the *Epilogue* to expreſs it ſelf with a joyful and triumphant Voice, but yet in a modeſt Way; unleſs it is neceſſary to intreat the *Judge's* Favour, altho even upon ſuch Occaſions, I would not adviſe a Man to weep, as we find, *Cicero* did in his *Defence* of *Quintius*.

Our Voice muſt alſo be alter'd according to the Variety of *Figures* we make uſe of; for in the *Proſopopeia*, becauſe another Perſon is introduc'd in our Diſcourſe, a different *Tone* of Voice is requir'd. In the *Antitheſis*, the *Contrariety* of the Subject demands a ſuitable *Oppoſition* of the Voice. In *Anadiploſis*, or the Repe-

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tition of the ſame Word, the ſecond Pronunciation muſt have a higher Accent and a louder Sound than the firſt. In an *Apoſtrophe*, becauſe we addreſs our ſelves to thoſe who are abſent and at a Diſtance from us, our Voice muſt be more elevated and higher rais'd. When we would affect our *Audience* with Joy and Admiration, we muſt uſe a loud, but a pleaſing Voice; when we would imprint Grief and Fear, a ſhrill and timorous Accent is proper: We muſt pronounce thoſe Things that ought to raiſe Indignation in a loud and threatning Manner, and theſe whereof People ought to be aſham'd, with a Sort of *fugitive* Voice. In *Tranſitions* we muſt always take Care gently to proceed to the End of the Sentence: For Nature abhors all ſudden and violent Motions, and loves rather to be led than drawn.

In Order to form our Voice according to theſe different Turns of Speech, it will be very convenient to pronounce aloud, after the Manner of a *Declamation*, either ſome of our own Performances, or of *Cicero*'s *Orations*, or ſome of the ingenious *Pleadings* of the *French Lawyers* in Preſence of our Friends, who are capable of correcting the Errors of our Pronunciation. The whole Man appears in the Face; and therefore our Countenance ought always to humour our Words, and be adapted to them: For there is Nothing ſo improper and unnatural as to expreſs trifling Matters with a ſerious Air, and to diſcourſe upon grave Subjects, with a laughing Face. We ought alſo to improve our Geſture by the decent Motion of our Hands: To move them always is like an *Actor*, and never to move 'em at all is like a

*Statue*

*Statue*; but none of these is proper for an *Orator*. But those things may better be learn'd by a nice Observation of other People's Behaviour, than from the Perusal of Books. And therefore we ought to propose some Person to our Imitation, whose Gesture, in publick Appearances, by a happier Success, has had the good Fortune to please others: And sometimes perhaps it may not be improper to consult our *Looking-Glass*, while at Home in our Closet, we form and prepare our selves for the publick Practice and *Pleadings* of the *Bar*.

There are a great many different Turns of Expression, and Kinds of Gesture, which the Nature of our Subject does plainly point out unto us. What Man that is going to mention the *Heavens* would look down to the *Earth*? And who would

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pronounce theſe Things which deſerve Admiration with a low and timorous Voice. The *Conjunction* of Things requires the *joining* of Hands; and the *Attraction* of things may be expreſs'd by the *cloſing* our Hands; and proportionably when the contrary happens. And if the Geſture may be perform'd by the Motion of one Hand, we ſhould uſe only one; and that ought always to be the right Hand. But yet we muſt obſerve that it is not proper, the *Orator* ſhould imitate all natural Actions. For what Man that is going to diſcourſe about a *Gun-ſmith*, or *Muſician*, would imitate their Behaviour at the *Bar*. Beſides, the Cuſtoms of every Country have monopoliz'd ſome particular *Geſtures* of the Body, and *Tones* of the Voice, which would perhaps ſeem indecent in other Places of the World. And the Faſhions that now prevail,

have intirely antiquated, and brought into Desuetude many of these Gestures which are mention'd by *Quintilian* and *Tully*; such as the violent striking our Knee or Forehead, walking hard and distorting the Body; all which would be laugh'd at and ridicul'd by a modern *Audience*. But this is certain that he who would strongly imprint any Passions in the Minds of his *Auditors*, must first endeavour to excite them in his own. Thus we find *Polus*, when he was to act the *Electrum* of *Sophocles* upon the Stage, held in his Hands the *Urn* of his own *Son* who had lately deceas'd, instead of the *Urn* of *Electrum*; at the Sight whereof he drew Floods of Tears both from himself and the *Spectators*. And just so the hearty Affection an *Advocate* bears to his *Client* will so raise his Spirit, and inflame his Soul, that his Discourse will prove

like

like *violent Fire*, whose Force and Vigour Nothing shall be able to resist.

And here I cannot but express my Wonder and Surprise, that, notwithstanding the daily Increase of Experience (the most excellent Mistress of *Oratory*) and altho the *Body* of our *Law* is considerably enriched and improv'd by a great many new *Statutes*, and *Arguments*, and *Decisions*, (the best Foundation, and most proper Materials of an Harangue) yet this *Eloquence* of the *Bar* does daily decay. The only Way I can possibly fall upon of accounting for it is this, that of old *Eloquence* being esteem'd noble and commendable in its own Nature was cultivated, and improv'd for its own Sake; and the *Gratitude* and *Prudence* of the *Ancients* return'd to it, not as a Reward and Encouragement, but as a just Debt and Tribute, Glory and Applause, and the supreme

Management and Adminiſtration of Affairs. For thoſe divine and immortal Spirits that ſhone ſo bright among the *Greeks*, and *Romans*, by reſolutely *defending Private* Perſons, and generouſly eſpouſing their Quarrels, were, in Conſideration of their eminent Services, by the Votes and *Suffrages* of theſe *private* Men, advanc'd to the moſt honourable Poſts and Dignities of the State, and employ'd in *Defence* of the Common-Wealth.

But now the Love of Money ſo unhappily prevails, that Nothing elſe is regarded, and the deſpicable Proſpect of Gain and Profit is the only Meaſure of all our Wiſhes; inſomuch that our *Modern Advocates* ſeem to mind Nothing but their own Intereſt and the ſordid Advancement of their private Fortunes. And by this Mean their *Genius* is render'd uncapable of lofty Deſigns, and never aiming at

high

high Matters cannot poſſibly attain the greateſt Things. Beſides our *Judges*, being deſirous of acquiring the Reputation of Celerity and Diſpatch, in the *Deciſion* of *Cauſes* are not very fond of hearing a Buſineſs diſcours'd upon at full Length: And thus the Liberty of Pleading being deny'd the *Orator*, together with this Freedom, the *Art* of *ſpeaking handſomely* has alſo decreas'd. And then that impertinent Crowd of *Procurators*, whom *Clients* employ in the *Tranſaction* of their Affairs, being utterly unacquainted with true *Eloquence*, do only chuſe and commend theſe *Advocates*, who have a mean and ſubtle Way of managing *Cauſes*, and do indeed plead with a great Deal of Caution and Circumſpection, but very aukwardly and with a very bad Grace. Nor is it improbable that the Study of that falſe and *ſophiſticated Philoſo-*

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*phy*, which at preſent is ſo much in Vogue in the Schools, by its impertinent Quibbles, and tedious Jargon about Things of no Moment, and by its harſh Terms, and barbarous Expreſſions has very much o'erclouded the Minds of Learners in the Beginning and Morning of their Studies; who by this Means extremely diſorder'd and confus'd are preſently ſent to the *Doctors* of *Both Laws*, (as ſome love to call them) who in a barbarous and uncouth Stile pretend to teach them the *Roman Law*.

The *ancient Orators*, who liv'd in a free Common wealth harangu'd their *Audience* with a great deal of Boldneſs, and believing Nothing to be above them, aſpir'd to the higheſt Things; and from a Breaſt which no ſuperior Force control'd, and that was affraid of no Body, proceeded every thing that ſavour'd of Liberty and was worthy

thy of it. For being accuſtom'd to plead before Free-born People they knew no other Limits or Reſtraint, than what they impos'd themſelves: They were allow'd to ſay what they pleas'd; and every Thing *pleas'd* them which ſavour'd of the noble Ardour of an *ingenuous* Soul. To this may be added that many from that malicious inclination, which is common and natural to Mankind, of reducing all to the ſame Level and Equality with themſelves; becauſe they are not able to raiſe themſelves to the utmoſt Pitch of true *Eloquence*, do therefore pretend to deſpiſe and undervalue thoſe *Orators*, whom they cannot equal; and endeavour to bring them down to their own mean Condition, when they perceive, there is no Poſſibility of exalting themſelves to that ſtupendious Height of *Eloquence* which they have ſo glorioufly attain'd. And

thus

thus they make it their Buſineſs to bring the *Art* of *Speaking handſomely* into Diſrepute, whoſe Fame and Reputation ſhall have the ſame Bounds with the World it ſelf, and continue as long as the Univerſe endures; and ſo when they appear at the *Bar*, leſt they ſhould be thought affected, they will not ſo much as ſeem to be *Orators*, and do not in the leaſt aim at a polite and agreeable Way of expreſſing their Thoughts. So that, upon the whole Matter, we may conclude that this Harſhneſs and *Ruſticity* of ours, is not ſo much the Fault of our *Genius*, as of the Age wherein we Live.

THE

# *The First* Pleading,

## From the *Law* of

# NATURE;

*By which a Woman, that had murder'd her own Child, is accus'd before the* Men *of* Inqueſt, *who in* Scotland *are* Judges *in Criminal Caſes, ariſing from* Matters *of* Fact; *and wherein the* Advocate *pleads after the Manner of the* Roman Orators, *without adducing any* Citations *of the* Laws *or* Doctors.

## *Gentlemen* of *Inqueſt*,

THIS Day you ſhall have a melancholy Proof of the greater Safety and Security which Infants

enjoy under the Protection of the *Laws*, than in the Bosom of their *Mothers*. And since the *Laws* vouchsafe to employ you as Ministers of *Justice*, and the uncorrupted *Channel*, through which it is convey'd to your Neighbours; let *God Almighty*, the severe Avenger of violated *Laws*; let your Countrymen, who are so much indebted to *Justice* for the Defence and Protection it affords them, be made sensible how safely the Administration of it is lodged in your Hands. No *Criminal* is here *impeach'd* by the Treachery of a corrupted Court, nor oppress'd by the malicious *Accusation* of some insolent Favorite. Here is no Bait of Covetousness in the *Charge*, nor does blind Revenge animate the *Accuser* with a furious Resentment. The *Laws*, and not Men, at their own Expenses, and from a paternal Care, accuse this poor Woman for the Mur-

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der of her own Child. For she being got with Child in *Holland* by some unknown Person, (and by this *Presumption* an Adulterer) left her Hypocrisy and Dissimulation should be discover'd by the Delivery of her Birth, (for she was a great Professor of Religion) being more concern'd about her Reputation than her Soul, she endeavour'd by pernicious Drugs to murder the Infant in her Womb, and render it abortive. But the Strength of Nature prevailing, and overcoming the Poison, she return'd to *Scotland* her native Country: And when by open Perjuries, and secret Contrivances she had conceal'd her Conception, she resolv'd upon the Death of that innocent Infant, to whom she had given Life and Being; and at length was deliver'd of the Child at her full Time, but yet under the Bed-Cloaths, that so the tender In-

fant might be ſtiffled for want of Reſpiration. And after ſhe had hid it for ſeveral Days under the Bed, ſhe deny'd it with horrid Oaths and Imprecations, when ſhe was urg'd by a great many Circumſtances and *Preſumptions*, to tell where ſhe had laid it. But her Delivery being diſcover'd, by the Skilfulneſs of Women, it was no longer in her Power to conceal the Crime. And yet after ſhe had confeſs'd the Birth, ſhe endeavour'd to hide the Infant; leſt the Marks of the Wounds and Bruiſes that were imprinted on its Body, ſhould riſe up as Witneſſes againſt Her: And therefore ſhe ſaid it was drown'd in a Pond; but when there it could not be found, ſhe would fain have perſwaded us that ſhe had taken Care to bury it. But at laſt, after that by a diſtracted and a fruitleſs Search ſhe had not found it, being overcome by the

Horror

Horror of her guilty Conſcience, and the Importunity of her *Accuſers*, ſhe diſcover'd the Infant, but ſo preſs'd beneath the Bed (in Order to conceal the Bruiſes) that its whole Body appear'd to be one Wound. *Gentlemen*, If one Man had ſlain another, if a Woman had occaſion'd the Death of her Enemy, or an *Enemy* had kill'd his Oppoſer; even theſe *Criminals* would have been capitally puniſh'd by the *Cornelian Law*. But if this unhappy Infant had been murder'd by its own Nurſe, what Puniſhments would this Mother have demanded? With what Cryes and Exclamations would ſhe have ſtunn'd your Ears? What ſhall we then ſay, when a Woman, guilty of Homicide, and a Mother of the Murder of her own Child, has comprehended all theſe Villanys in one ſingle Crime? A *Crime*, in its own Nature odious and deteſtable; in a

Woman

Woman prodigious, and in a Mother incredible; and perpetrated againſt one, whoſe Age did call for Compaſſion, whoſe near Relation demanded Affection, and whoſe Innocence might have deſerved Favour.

In order to prove her guilty of this hainous Crime whereof ſhe is accus'd, I hope, *Gentlemen*, I may be allow'd to take it for granted, that all thoſe are guilty of Murder who kill their Neighbour by Treachery or any premeditated Deſign; and that the Greatneſs of this Crime is not to be meaſur'd by the Loſs of Blood but of Life. And therefore one that abandons an old Man upon a ſolitary Rock, entirely ſurrounded by Sea, or expoſes an Infant on the Top of a Mountain, deſerves as ſevere a Puniſhment as if he had kill'd them with his own Hands, and ſheath'd his Sword into their Bowels. The *Laws*

do

do not regard the Means, but the Effects and Conſequences of Actions; otherwiſe wicked Men would chuſe rather to fruſtrate their Deſign by their Cunning and Artifice, than publickly to affront them by open Acts of Violence and Injuſtice. So that by this means their Deceit and Knavery would ſerve inſtead of a Pardon; while it is yet the ſame Thing to thoſe Miſerable Perſons, by what ever Ways and Contrivances their Enemies have accompliſh'd their wicked Deſigns. Of all living Creatures Infants are leaſt in a Condition to reſiſt any Violence that is offer'd to them; and can ſubſiſt under it the ſhorteſt Time, when they are deſtitute and depriv'd of the neceſſary Supports of humane Life. Thoſe who are arriv'd to a riper Age and Judgement, can make Shift, by various Methods, to eſcape the Ruine

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which is threatn'd againſt 'em, and deſtin'd to them; but Infants are not able to entreat others to afford them that Help and Aſſiſtance which they are not in a Condition to furniſh of themſelves. And therefore the *Civil Law* has made the *expoſing* of Infants a diſtinct Sort of Crime, and order'd it to be puniſh'd as a particular Kind of *Homicide*. And very juſtly; for who would ſpare one that was ſo barbarous as to *expoſe* an Infant, and by *expoſing* it, occaſion'd its Death? When a Man happens to kill one who is advanc'd in Years, he may either endeavour to extenuate his Crime, by alledging he was provok'd to it by ſome intolerable Injury that was done unto him, or he may reaſonably hope that the *Judges* will conſider the Frailty and Weakneſs of humane Nature, and that he was blindly hurried on to the Commiſſion of it by Reſent-

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ment and Revenge. But in Infants we cannot imagine a Poſſibility, either of a preceding Injury, or a ſubſequent Revenge, ſince they have no Memory to render 'em capable of the one, nor Judgement to enable them to perpetrate the other. Now of all the Murderers and Deſtroyers of Infants a Mother deſerves to be puniſh'd with the greateſt Severity; in whom the Want of Kindneſs, and Deficiency in Point of natural Affection is of it ſelf not the loweſt Degree of the Crime, and where not to take due Care of 'em, is in Effect, to deprive them of their Life and Being. But this Woman has not only in an unaccountable Manner neglected the Preſervation of her Infant, but by her Cruelty kill'd it, and prov'd the Occaſion of its Death. For in this Caſe, that this *Criminal* had long before re-

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ſolv'd on the Deſtruction of her Child is plainly evident from the Conſideration of this one hainous *Circumſtance*, that aſſoon as ſhe began to be ſenſible, ſhe was with Child, ſhe took violent Poiſon, that naturally uſes to procure Abortion, which is the only Refuge and *Aſile* of theſe miſerable Wretches, who in Reality deſerve not any. By which Contrivance ſhe endeavour'd to overcome *God* and her Conſcience, altho ſhe could not vanquiſh the Strength of Nature; and ſo adding one Crime to another, while by repeated Denyals and ſacrilegious Oaths, ſhe daily harden'd her Conſcience, and enhanc'd her Guilt; ſhe was at length deliver'd of a Child, even in a Place where Women were preſent, but never deſir'd their Aſſiſtance, and tho they cry'd to the *Pannel*, and offer'd her their Help, whoſe Buſineſs it was ra-

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ther to have intreated theirs, yet she obstinately refus'd to acquaint 'em with her Circumstances, and discover her Condition unto them. So that she is not only guilty of refusing to accept of Assistance, which is so barbarous and unnatural a Piece of Neglect, that the *Laws* make it a Crime; but she actually *suffocated* the Infant, by being deliver'd of it under the Bed- Cloaths. For any new-born Child will die, if it lyes but a Moment under the *Bed-Cloaths*, much more if it continues for a whole Night. And if it is true which *Physicians* and *Midwives* positively affirm, that if the first Breathing and Respiration of an Infant is stopt it will presently die, what Possibility was there of this Infant's escaping Death, whose Respiration was entirely stopt for several Hours; and which, altho it had not died, the same Moment it began to

live, yet we cannot imagine would have long ſubſiſted in ſo miſerable a Condition, when it was wallowing in an uncertain Fate, amidſt Excrements and Blood; being wholly deſtitute of all theſe Helps, whereof the leaſt is abſolutely neceſſary to the Preſervation of its Life? And ſince in *Law* he who denys one Food and Nouriſhment is accounted guilty of his Death, how much more Reaſon, have we look to on a Mother as guilty of the Death of her Child, when ſhe cruelly refuſes it the Means of Reſpiration; by the Want whereof all things that live by Breathing will with more Certainty and Expedition be deſtroy'd than by Want of Food. And who can doubt that *that* Perſon murder'd her Child who ſhut it up in a Cheſt? And therefore ſince the *Laws* have moſt juſtly provided againſt all imaginable

Methods

Methods of deſtroying Infants, not only in Order to prevent it, before it is perpetrated, but alſo ſeverely to puniſh it, after the Commiſſion of it; can there any Ground or Colour of Reaſon be poſſibly aſſign'd, why this Way that is invented by the Wickedneſs of Mankind, and which is the eaſieſt and ſafeſt, and moſt effectual in the World ſhould eſcape the Puniſhment it ſo juſtly deſerves.

*Gentlemen*, If ſhe had *expos'd* this Child, ſome fortunate Stranger might probably have ſav'd its Life, and by affording it ſuch ſeaſonable Help and Aſſiſtance, diſcover'd that charitable Diſpoſition which its unnatural Mother unhappily wanted, the Cryes of an Infant, in this melancholy Condition, would have excited the Compaſſion of Travellers, and its Tears were capable of ſofteming and mollifying the Heart of any Stranger in the

World

World. But a miſerable infant, cover'd and oppreſs'd with Garments and Bed-Cloaths, was not only deſtitute of the Help of its Mother, but even depriv'd of the Aſſiſtance of every other Thing that could poſſibly be ſerviceable to it. In the other Caſe the Mother's Behaviour would not be ſo criminal, becauſe ſhe withdrew from ſo diſmal a Sight as the Death of her own Child, which ſhe was not able to behold: But in this, ſhe was cruel and barbarous, who altho ſhe gave Life to the *Embryo* in her Womb, did yet endeavour to deſtroy it by Poiſon: And afterwards, when ſhe was deliver'd of it, could endure to ſee it dying by her execrable and accurſed Hands; and choſe rather to expoſe her Life to the utmoſt Danger, by ſuppreſſing thoſe dreadful and intolerable Pangs of Child-Birth, which only horrid Impiety, and moſt unac-

countable

countable Cruelty were capable of concealing, than to implore the Help and Assistance of her Neighbours, when yet all the Support that can possibly be given to Women in these Circumstances is very inconsiderable and very insufficient.

If ye ask me, *Gentlemen*, what Motives and Considerations may probaly have induc'd her to commit this horrid Act; you are not ignorant how vehement and unaccountable are the Passions and Affections of Women both Ways; they love violently and hate immoderately; and to whatever Side they incline, they are not govern'd by Prudence, but transported with Rage. So that if this Reflection concerning the *Sex* in general is true; what could we expect from this *Pannel*, whom neither Modesty was able to reclaim from Lust, nor the Softness of her Sex from Cruelty, nor all her spe-

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cious Pretences to *Piety* from Wickedneſs and *Irreligion*? And who by the Death and Murder of this innocent Child was in Hopes, ſhe would eſcape the Puniſhment of Adultery, the Brand of *Hypocriſy*, and the Infamy of a Whore. But I would fain ask her, why ſhe thought fit to prefer a ſervile Baniſhment abroad, in a forreign Country to the civil and friendly Entertainment ſhe met with at Home? Why ſhe attempted with the extreme Hazard and Danger of her Life to put away the Birth of her Womb, whereof all Mothers are wont to have ſo tender and affectionate a Care? Why did ſhe conceal her big Belly with ſuch horrid Oaths and Imprecations, when it expos'd her to inevitable Ruine? Whence proceeded that prodigious Strength which enabl'd her to perform her *domeſtick* Services immediatly after her Deli-

very

very ? What was the Occaſion of that ſudden Terror, with which ſhe was inſtantly ſtruck upon the firſt Suſpicion ? From whence came that miraculous and unaccountable Diſorder, whereby ſhe was infatuated to ſuch a Degree, that ſhe could neither find nor conceal the Grave of her murder'd Child ? Are theſe the infallible Teſtimonies of a calm and innocent Breaſt, or of a frighten'd and awaken'd Conſcience ? And therefore if we will not truſt the *Laws*, let us hear the Voice of *Nature* ; let us take thoſe things for granted which the *Criminal* her ſelf, from a Conſciouſneſs of her horrid Guilt has been forc'd to confeſs ; and laſtly let us believe *Almighty God* who has given us ſo clear and evident Proofs of the Truth and Certainty of this hainous *Fact*, that we may as well require *Sun-ſhine* at *Midnight* as demand any further *Demon-*

*ſtration*, ſince we have all the Arguments on our Side, which the Nature of the thing is capable of.

And from hence we may eaſily furniſh an Anſwer to thoſe Objections on which the *Pannel*'s *Advocates* lay ſo much Weight; and whereby they would fain reduce me to a Neceſſity of proving that the Child was born alive, ſince Nothing can properly be ſaid to be murder'd which never had Life and Being. Beſides they affirm that all theſe Things amount to no more than this, that they found a probable *Preſumption*, and that no Crime is to be *infer'd* from Preſumptions, on which any greater than *arbitrary* Puniſhment can in Juſtice be inflicted. To the firſt I anſwer that it plainly appears from the Confeſſion of the *Pannel* herſelf, that ſhe was big with Child, and that the Infant was born at full Time; which is alſo con-

firm'

firm'd by *ocular Inſpection*, taken by Women that are skill'd in theſe Matters. And therefore by a juſt and neceſſary Conſequence we muſt needs be induc'd to believe that the Child was born alive; *for that which any thing ought to have, is always preſum'd to be in it.* Nor do we ſtand in need of clearer *Evidence* againſt one who by her Treachery, and Wickedneſs has taken away all Poſſibility of further Proof, and endeavour'd to conceal one Crime by another.

*Gentlemen*, let us ſuppoſe that two Witneſſes ſaw this unnatural Mother cutting the Throat of her own Child, Would there be any Neceſſity of proving, it was born alive? Or if it could plainly be made out, that a Mother *expos'd* her Child upon the Top of a Mountain, in a dark and *tempeſtuous* Night, Would any Body have the Face to demand a Proof of its being

alive before? No, I am confident, it would not be requir'd, for *againſt one who is engag'd in an unlawful Action, that which in its own Nature will not admit of any further Proof, is look'd upon as fully prov'd.* Nor does this Aſſertion derive any Danger or Inconveniency, either upon the publick or innocent Perſons; ſince by this Means the avenging Sword of *Juſtice* ſhall only threaten the impious and guilty: Whereas, on the contrary, if this Woman eſcapes, no Mother, tho actually guilty, ſhall, for the Future, be brought to the Puniſhment her Crime deſerves: (Altho the Murder of innocent Infants is the moſt atrocious Piece of Villany, and the moſt hainous and horrid *Crime* that can poſſibly be imagin'd) and ſo the one hal of it being perpetrated would affor an Impunity to the other. Beſide that when the *Laws appoint any Crim*

*to be puniſh'd, they, at the ſame Time, grant all theſe Things without which it is impoſſible to prove it*; altho in other Caſes this is not allow'd. And thus we find that tho Servants are not regularly admitted in an *Accuſation* as *Witneſſes* in Behalf of their Maſters, yet if any Man ſtrikes a Maſter of a Family in his own Houſe, or beats the Maſter of a Ship, in his own Ship, the Mildneſs and *Benignity* of the *Law* (which by a friendly Condeſcention does always accommodate it ſelf to our Utility and Advantage) has in this Point prudently remitted ſomething of the Rigour of its own *Definitions* by allowing the Teſtimony of Servants, leſt otherwiſe, through the Wickedneſs and Malice of the *Aggreſſor*, the injur'd *Party* ſhould want ſufficient Proof.

As to the other Argument, I anſwer that altho I can adduce *Preſumptions*

which

which are more infallible and convincing than any *Witneſſes* in the World, becauſe by a neceſſary Conſequence they are drawn and deduc'd from the very *Bowels* of Nature, and ſo cannot poſſibly deceive us, as Witneſſes very often do; inſomuch that we only rely upon their Teſtimony, becauſe we believe and *preſume* that Men who are indifferent and unconcern'd *Spectators* will not eaſily be induc'd to damn their Souls for ever by committing ſo unaccountable a Piece of *Falſhood* and Injuſtice; yet in our Caſe the *Probation* is not founded on bare *Preſumptions*, but we have here a *poſitive Crime* clearly prov'd and made out, namely that this wicked Woman, aſſoon as ſhe was deliver'd of her Child, hid it beneath the Bed-Cloaths, and left it in that Condition. Now it is plain beyond all Debate, that this was a ſurer and more effe-

ctual

ctual Method of killing this Infant, than if ſhe had baſely reſolv'd to murder it by Poiſon or a Dagger. So that ſhe is clearly convicted of this Crime by the infallible Dictates of Senſe and Nature. In this Caſe we do not make uſe of a *Law* that is enacted, but one which is born with us: About this Matter we have not appointed a *Law* but receiv'd it with our *Breath*; not becauſe ſuch a Villany does not deſerve Death, but becauſe no *Judge* that thinks otherwiſe, is worthy of Life. Would not voluntary and premeditated Murder be capitally puniſh'd, altho there were no Law among us enacted about it? And was it not actually puniſh'd with Death, before there was any ſuch *Conſtitution* made? Altho we are not expreſly forbidden to *ſuffocate* a Man, by any *capital Statute*, does not yet the *Julian Law* comprehend this Crime; and

and tho ſome Nations have thought fit by *poſitive Statutes* to ordain that theſe Women, who in Time of Child-Birth call not for preſent Aſſiſtance, ſhall be puniſh'd with Death, we muſt not therefore conclude that thoſe who have no ſuch *Law* do entirely remit this Severity; for theſe, albeit they have not enacted ſuch a Law, do yet in their *Practice* as effectually provide againſt it, as they who have appointed an expreſs *Statute* for this Purpoſe; eſpecially where the frequent Commiſſion of the Crime, the Genius of the Age, and the Temper and Inclination of the People, (whereof we have the unhappy Experience among our ſelves) ſeem neceſſarly to require this juſt Severity. By which Conſiderations, thoſe who lately diſcharg'd the ſame Truſt, with which you are at preſent inveſted, did inflict a capital Puniſhment on one Woman of

*Perth-*

*Perth-Shire*, and another of *Lothian*, upon Account of this fatal Omiſſion. And we have Infinite Reaſon to adore the over-ruling Providence of *Almighty God*, in the *Detection* of three others, who, for the like Crime are at preſent in cloſe Confinement; that ſo by the Remembrance of ſuch a horrid Act, ſo lately committed, your Zeal and Reſentment might be heightned and increas'd. But we are not limited by ſo narrow Circumſtances; for we accuſe a wicked and barbarous Mother, *ſuffocating* and ſtrangling her own Child; to which heavy Charge the Neglect of neceſſary Aſſiſtance is only adjoin'd as an *Aggravation* of it.

Nor ought ye, *Gentlemen*, to be mov'd by the *Preſumption* of natural Affection in a Mother, as if this were of more Weight and Conſideration than all the *Preſumptions* which I have adduc'd; for ſhe endeavour'd by

Poiſon to hinder her ſelf from proving a Mother; and after ſhe was one, took all poſſible Care to throw off the Kindneſs and Affection of a Mother by the execrable Murder of the Birth of her Womb. She could not hinder herſelf from being a Mother, but She ſoon appear'd entirely void of all *Maternal* Affection. This natural Love was all that the Poiſon could carry off, the Remainder whereof ſhe ſtifled, together with her Child. What did thoſe Women hear that favour'd of a Mother, who offer'd her their friendly Aſſiſtance when ſhe was in Child-Birth? What did theſe behold in her Countenance or Geſture who ſearch'd with her for the Infant, through the Rivers and Church-Yards? What do ye juſt now perceive your ſelves in her ſmiling and unconcerned Face, ſo vaſtly different from the *ſqualid* Appearance, and mourn-

mournful Looks of those that are depriv'd of their Children? Since therefore it did not avail this *Infant* that she was a Mother, let it not be any Advantage to the *Mother*, that she was so unhappily desirous of hindring her self from being one.

*Gentlemen*, I hope, you will pardon me, if I have dwelt too long upon this *Accusation*, which ought rather to be furnish'd with Tears than Words. Let us therefore take off our Eyes from so disagreeable and bloody an Object; since there is neither any such Defect in the Proofs I have adduc'd, or in your Knowledge of this Affair as requires a further Illustration. In this Case *Nature* will plead for her self, and more vigorously maintain her *Cause* in your Breasts, than it is possible for me to do at the *Bar*. She will present to your View the lovely Countenance of this murder'd Infant,

ſmiling upon its barbarous Mother, in the very Commiſſion of this horrid Act. She will ſhew you its trembling Lips the very Moment it was miſerably expiring, and repreſent unto you in lively Colours the execrable Cruelty of this unnatural Woman. She will infallibly pronounce thoſe guilty of the Dangers which from hence ſhall be deriv'd on Poſterity, and the Murders of our Country-Men that are yet to be born, by whoſe *Cruel* Clemency this *Pannel* ſhall eſcape, if it is poſſible for her ſo to do; terrifying your Eyes with the dreadful Sight, and ſtunning your Ears with the diſmal and melancholy Groans of expiring Infants; filling your Houſes with Lamentations, and your Conſciences with Terrors that ſhall never have an End.

Behave then, *Gentlemen*, as we expect from Perſons of your Character and

and Reputation in the World, who, while you yet continue in a mortal State, have the happy Prospect of a glorious and blessed *Immortality*, and for whom Crowns of *Lawrel* are prepar'd in *Paradise* that shall never fade or decay, in Consideration of the many extraordinary Services ye have done your Country, by rescuing the Innocent from the devouring Jaws of their Oppressors, and subduing Vice and Impiety by the impartial Sentences which you pronounce. Do ye therefore take off the Mask from Lust, and remove the Edge of Cruelty, restore Equity to our *Judicatures*, and Safety to our *Country*.

THE

# *The Second* Pleading,

## From the *Law* of

# NATIONS.

*Whether by the* Law *of* Nations, *and the* Civil Law, *a* Ship *is acquir'd by* bare Purſuit *without* actual Apprehenſion?

*MY Lord Preſident*, Neither the dreadful Surges of the foaming *Ocean*, nor the Conduct and Bravery of the *Hollanders* in Maritime Affairs, encourag'd by the Hopes of Glory and the Proſpect of Gain, were able to deter my *Client* from committing himſelf, and all that he had, to the Mercy of the

the Faithleſs Sea, and from endeavouring to acquire Victory and Renown to his Prince in a Ship which he had mann'd and furniſh'd at his own Expences; accounting Glory better than Pay, and Conſtancy and Fidelity to his Sovereign's Intereſt, to be better than any Reward. And yet now that he has taken from the Enemy the Ship which coſt him ſo much Toil and Labour, his *Accuſers* more barbarous than the *Tempeſts*, and more cruel and malicious than the *Rocks*, do not only endeavour to deprive him of the Price of his Blood, but, at the ſame Time, unjuſtly attack his Fame and Reputation; and in the *Charge* which they manage againſt this faithful Subject, who was never wanting to his Prince or Country, upon any Occaſion, either in Point of Piety, or Fidelity, or Valour, they defame him as a Pirate, who treacherouſly carried

off

off a Ship that was purſu'd by one of his Majeſty's Officers, and would in all Probability have fallen into his Hands. The Falſhood and Injuſtice of which *Accuſation* will eaſily appear from this Repreſentation of the Affair.

Captain *Rankin*, in a Ship protected by his Majeſty's Authority, was cruiſing along the Enemy's Coaſt; near which he diſcover'd a Veſſel call'd the *Snail*, carrying the *Dutch* Colours, which at length he came up with, after a vigorous Purſuit of ſeveral Hours, and oblig'd to ſtrike Sail, being only hinder'd from Boarding her by the ſudden Approach of a *Man of War* that was proudly adorn'd with the Enemy's Flag. But aſſoon as our Commander diſcover'd it to be a *Friend*, he return'd to his Prize, and put ſome Mariners and Souldiers Aboard it, by whom it was brought into *Scotland*, and there by the *High*

*Ad-*

*Admiral* adjudged to him. So that we have in ſome Meaſure already gain'd our Point, notwithſtanding all the *reclaiming* of our *Adverſarys*, whoſe Arguments, in my Opinion, will not appear to have the greater Force, becauſe by that ſupreme *Judge* they have already been *repell'd* and condemn'd.

*My Lord*, The Arguments of our *Adverſaries*, whereby they charge this Sentence with Injuſtice do plainly ariſe from a quite different Narration of the *Matter* of *Fact*. For the *Man of War*, as they pretend, attack'd one of the Enemy's Ships, which was the *Convoy* of three *Merchant-men*, whereof the *Snail* was one; and during this Engagement, while thoſe under Protection were endeavouring to make their Eſcape with all imaginable Celerity and Expedition: They accuſe *Ranken* of treacherouſly carrying off one of them, which would certainly

have become his Majesty's Prize. And were this allow'd, they say, it will come to pass, that nothing shall for the future fall to the King: For it will always be carried off by these mercenary Fighters, who sail after the *Men* of *War*, as we find in the Fable, *The Lyon is followed by the golden Wolf*. And when any of the Royal Fleet shall happen to attack one of the Enemy's Ships, they by Treachery robbing them of their Booty, will leave them Nothing but a bloody Victory, and an empty Triumph; and so the Prize shall not be the Reward of Losses and Valour, but of hidden Treachery and secret Fraud.

*My Lord*, The second Argument of our *Adversaries*, as they tell us, is taken from the first Principles of the Civil Law; in which we are told that it is not he who is first possess'd of a thing, but he who is first engag'd

in its Purſuit, that acquires a Title to it. So that if two Perſons happen to diſcover a *Jewel* lying upon the Shore, he who firſt perceiv'd it and not he that firſt ſnatch'd it with his Hand ſhall be accounted the lawful Owner. And juſt ſo a Man who diggs a Treaſure will not loſe his Right by the Interpoſition of another Perſon, who, (while the firſt is employ'd in the Search of the Thing)has the good Fortune to light upon it. Add to this, that in the hunting of wild Beaſts, which has the neareſt Reſemblance of the violent Manner of Occupation that is uſed in War, *Trebatius* is of Opinion, (*a*) 'That the wild Beaſt be-
'comes preſently ours, and ſeems to
'be ſo as long as we continue our
'Purſuit; but that if we give over
'the Chaſe, it is no longer ours, but
'appertains to him that ſeizes it; and



(*a*) 5. ff. De Acquir. rer. dom.

'therefore, if in the mean Time, 'while we are purſuing our Game, 'another ſnatches it from us with a 'Deſign to acquire the Property of it 'to himſelf, he ſeems in our Judg-'ment to be guilty of Theft. And altho' the Opinion of *Trebatius* is repudiated in that Law, yet that by the Law of Nations it is univerſally eſtabliſh'd, appears from *Minſingerus* (a) whoſe Words are theſe, 'Which O-'pinion of *Trebatius* ſeems at this Time 'very much to obtain among Hun-'ters; for altho' I am not yet actual-'ly in Poſſeſſion of the wild Beaſt, ye 'it is not lawful for another to ſnatch 'it from me and treacherouſly to in-'terpoſe when I am engag'd in th 'Purſuit. And this is alſo agree able to the Sentiments of *Baldwin*, u pon the ſame *Par*. 'For neither, *ſay* 'he, does the Opinion of *Trebatiu* 'war

(a) Inſtitut. L. 2. §. 13.

'want Reaſon to ſupport it, ſince 'we ought not only to abſtain 'from that which is anothers, but 'alſo from that which is juſt upon 'the Point of falling into his Hands, leſt 'we deprive him of his pleaſing Pro-'ſpect, and invade his promiſing 'Hopes, which have probably coſt 'him a great deal of Toil and La-'bour. For who would not think it an intolerable Piece of Injuſtice that his Pains and Induſtry ſhould be ſo much defeated and wearied out? Nor does this only obtain here, but even takes Place in *Jurisdictions*; for in them there is ſo much Room for *Prevention* that he who firſt cited the *Criminal*, and not he who firſt pronounced the Sentence is always ſure to be prefer'd. For when once the *Judge* has begun to proſecute his Right, he will not be prejudg'd by the *Emulation* and Induſtry of a neighbouring Jurisdiction.

*My*

*My Lord*, The third Argument of our Adverſaries is taken from the Rules of War: For ſince the *War* is carried on at the King's Expences, and the Laws of *Military* Diſcipline are conſtituted and enacted by him, he is always prefer'd in the Diviſion of the Booty which is preſum'd to be acquir'd by the publick Power and not a private Hand; and therefore it always falls to the Share of the Republick, and the Prince; Largeſſes and Rewards being beſtow'd upon the Souldiers and Allies according to their Merit and Bravery, and in Conſideration of the eminent Services they have done the State. As *Grotius* informs us at length (*a*): So that in the preſent Caſe, ſince *Rankin* has done Nothing, the Man of War being ſufficient for the Victory, they affirm that he deſerves Nothing for his Pains.

But

(*a*) Lib. III Cap. 6,

But yet, *My Lord*, notwithſtanding all theſe plauſible Objections, I contend that this Prize ought to be *confirm'd* in Favour of my *Client*, and therefore do offer the following Arguments to your Lordſhip's Conſideration. The Compilers of the *Civil Law*, endeavouring to eſtabliſh the Property and Dominion of Things (that ſo theſe Things which are in their own Nature moſt valuable might have the ſureſt and moſt durable Foundations) are of Opinion that the Dominion of things which we purſue, does not depend upon the wandring and uncertain Intention, but on our actual catching of them. (*a*) "Therefore wild Beaſts, & Birds, and Fiſhes, 'and all living Creatures which are 'born in the Sea, Air, or Earth, aſ-'ſoon as any Perſon has catch'd them, 'do preſently become his by the *Law* of

(*a*) § 12. Inſt. de Rer. Div.

'of *Nations*. (*a*) After the same 'Manner those things that are taken 'from the Enemy by the *Law* of *Nations* belong to them who catch them. 'And (*b*) all living Creatures which 'are catch'd either in the Earth, Sea, 'or Air, do then appertain to those 'who take them. From which Places it plainly appears that the Laws were unwilling to expose the Measures and Foundations of Right and Dominion to the Humour of the *Judge* and to commit them to doubtful and uncertain Conjectures, lest by this Means, Witnesses should become *Judges* and *Judges* behave like Tyrants. For what looser Method of discovering the Truth can possibly be invented than to admit the *Deposition* of a Witness concerning the Probability of a Thing, and whether it was possible for the Ship to escape. And what Credit

(*a*) S. 7. L. 5. ff. de acq. rer. Dom. (*b*) P. 1. l. 1. eod. tit.

Credit is here given to the Senſes? Leſt therefore Judges ſhould be at a Loſs how to determine this Matter, they require in ſuch Caſes, *Corporal*, *Actual* and *Natural* Poſſeſſion, which being ſubject to our Senſes, can neither fail nor deceive us. And therefore (*a*) *Nerva* the *Son* ſays, 'That the Dominion of Things ariſes from *natural* 'Poſſeſſion, and that the Effects of 'it remain in theſe Things which are 'taken in the Earth, Sea, or Air; 'for they immediately belong to 'them who firſt attain the Poſſeſſion of 'them. Which Poſſeſſion *Theophilus* 'calls *natural* Poſſeſſion, when a Thing 'appertains to him who catches it.

And, as *Vinnius* obſerves, altho' a bare Inclination to take a Thing is ſufficient to retain the Poſſeſſion of it, yet it is abſolutely neceſſary that there be a *corporal Occupation* and *natural Ap-*



(*a*) L. 1. §. 1. ff. De acq. & amitt. Poſſ.

*prehenſion* of it at firſt. Add to this, (*a*) 'That it is ordain'd, that a 'wild Boar, taken in my Net, does 'not belong unto me, altho' I am poſ- 'ſeſs'd of it, unleſs (as *Bart.* obſerves 'upon that Law) I actually take it 'with my own Hands.

The Words of the *Law* are theſe, 'A wild Boar chanc'd to fall into a 'Net which you had laid for Hun- 'ting, and when he was lying ham- 'per'd in it, I carry'd him off. Now, 'whether or not do I ſeem to have 'unjuſtly depriv'd you of your 'Boar; and if you imagine you had 'any Title to him, ſuppoſe I had re- 'ſtor'd him his Liberty and let him 'looſe into the Woods: Whether in 'this Caſe would he have continu'd 'yours or not? And what *Action* 'could you have againſt me: Pray, 'whether an *Action in factum.* He an-

(*a*) In L. 55. ff. De acq. rer. Dom.

'answer'd, let us consider the Net, 'because the *Case* alters, if I have 'plac'd it in publick or private 'Ground; and if in private, whether 'in my own or in that of another Per-'son; and if in another's, whether 'I have laid it with the Consent of 'the Master of the Ground, or with-'out his Permission. Besides, it ought 'to be consider'd, whether the *wild* 'Boar stuck so fast in the Net, that he 'could not possibly have extricated 'himself; or if by longer strugling, he 'might have disintangl'd himself from 'it. Upon the whole Matter, I am 'of Opinion, that if he had fallen into 'my Hands, he would have belong'd 'unto me; but, if you had given him 'his natural Liberty, by that Means he 'would cease to be mine, but still I 'would have an *Action* against you 'upon your *Fact* and *Deed*. And there-

fore *Puffend.* (*a*) affirms, 'That '*Moveables*, in Order to their becoming ours, ſtand in need of *corporal Apprehenſion*, and ought to be remov'd from the Place in which they are, into our Cuſtody and Poſſeſſion: And therefore the young ones of Birds, and Whelps of wild Beaſts remaining in their Neſts or Caves, do not become mine, altho' I have touch'd them, unleſs I actually remove them, and carry them home.

Secondly, *My Lord*, That natural Poſſeſſion is requir'd, in order to attain Dominion, does not only appear from theſe *poſitive Definitions* and ſeveral others, but alſo from the Reaſon which is aſſign'd for it in the Laws themſelves. For ſince *Apprehenſion* is a way of *acquiring* Dominion which deſcends from the *Law* of *Nature*, it is reaſonable that it ſhould be

(*a*) De Jur. Nat. Cap. 6. §. 9.

be compleated by *corporal Poſſeſſion* which is only accounted *natural* by the *Doctors*, as the Methods of acquiring, which deſcend from the *Civil Law* are alſo confirm'd & eſtabliſh'd by *Civil Poſſeſſion*. Beſides, as the *Inſt.* (*a*) & *Dig.* 6. inform us 'Many Things may happen and fall out, which may hinder 'the wild Beaſt from being taken. To which may be added what *Grotius* ſays, *Cap.* 5. *De mari libero.* 'After 'we had found out Property, *ſays he*, 'ſuch a Law was made about it as imitated Nature. For as at firſt, the Uſe 'of Things was *exercis'd* by *corporal* 'Application; from whence we affirm, 'Property firſt aroſe, ſo it was thought 'convenient that by the like *Application* the Property of every Thing 'ſhould be attain'd. This is what 'we call *Occupation*, which is a Word 'excellently accommodated to thoſe 'Things

(*a*) De rer. div. §. 13. 6. L. 5.

'Things that were common before. And in the same Chapter, *Grotius* tells us, 'That *Occupation* in *Moveables* is 'actual *Apprehension*, and the *Applicati-* 'on of one Body to another.

And this is more fully explain'd by *Theophilus*, "For perhaps, *says he*, 'The wild Beast, which I had wound- 'ed did suddenly disappear, or hin- 'der'd me from advancing further; 'or while I was engag'd in the Pur- 'suit, I might chance to fall into so 'wild and uncultivated Places, that 'it would be impossible for me to fol- 'low out the Chace. All which does excellently agree with true Philoso- phy, right Reason, and the *purest Principles* of the *Civil Law*. For how can that be call'd ours which still en- joys its natural Freedom. Nor is it possible for two Men to be at once en- tirely Masters of the same Thing: And since as yet it either may be mine, or

may

may not, we ought to conclude that it does not belong unto me, *for the Concluſion ſhould always follow the weaker Part.*

Thirdly, *My Lord*, If our Right and Property did not depend upon this Mark of acquir'd Dominion, demanding *actual* and *corporal Poſſeſſion*, where could we poſſibly drop our Search and Inquiry? For all other Marks of Poſſeſſion are very deceitful; ſo that when the Law preferring Certainty to Equity, requires exact and determin'd Rules, whereby all other Things, tho in their own Nature never ſo ſmall and inconſiderable, may be preciſely fix'd; yet Dominion and the Property of Things (which are Points of the greateſt Moment and Importance) would be left doubtful and undetermin'd.

How could we without this Poſſeſſion *adjudge* to the Souldier the Property

perty of his Booty, the wild Beaſt to the Hunter, a Jewel to the Finder, and a Treaſure to the Perſon that diggs it? But of all Things that can be *apprehended* there is Nothing more uncertain than a Prize taken at Sea, which therefore does moſt of all require *actual Poſſeſſion*, where the Event like the Winds and Ocean, on which it depends, is doubtful and wavering. For how ſoon may the Sails, which a little while before were ſwell'd and full blown cleave to the Maſt by a ſudden Calm or be violently torn away from it by a dreadful Tempeſt. Nor is it improbable that the Ship it ſelf may either loſe its Way, by the Interpoſition of dark and lowring Clouds, or be unexpectedly ſunk in the Waters by ſpringing a ſecret Leak. Beſides, an unhappy Quarrel among the Mariners may ſtop its Carreer; or the Error of an ignorant Pilot may

may so divert its Course that the Passengers shall lose both their Hopes and Ship.

Fourthly, *My Lord*, I would think it necessary, that in *War*, more than in any other Sort of *Occupation*, Dominion and Property should be determin'd by certain Bounds. For who would expose his Life and Blood for so doubtful a Prize; since at this Rate he would have no other certain Purchase, than painful Wounds, and the clashing of Swords would be turn'd into Debates of *Law*? And how inconvenient would it be for the Publick, that Souldiers, amidst the loud Noise of their Arms, and the shrill Clangour of their Trumpets should be distracted by the refin'd Niceтys, and Subtletys of the *Bar*? This would arm them against each other; and we cannot possibly imagine any Thing that more directly tends to the Prejudice of the

Common Wealth, than by these Difficulties to discourage Souldiers from pursuing the Enemy; who would not endeavour to take them in their Flight, altho they were routed and dispers'd by their own Troops: And after the Merchant-Ships were scattered by the Royal Fleet, none of the Privateers would vigorously pursue them, being sensible they would gain no Prize to themselves by so doing. By which Reasons and Considerations our *Lawyers* have been induc'd to determine that every thing which is *apprehended* does, without any Manner of Distinction, appertain to him that takes it. And as *Alberic. Gentil.* de *Advocat.* (a) says, "Those things that are yet to "be catch'd ought not to be look'd "upon as already taken and gain'd "from the Enemy. Nor was it ever doubted that these Souldiers should receive

(a) Hispan. C. 4.

receive the Ranſom who have taken the Captives, altho others by routing and diſperſing them were the Occaſion of their Flight. Nor is there any Kind of War, in which the Liberty of taking Priſoners ought to be further extended than in this which is manag'd and carried on by Subjects at their own Expences. And indeed a Sea Engagement is ſo bloody and terrible a Sight that this Liberty ought to be indulg'd them inſtead of Pay, and this *Pay* ſhould be augmented upon the Account of the Dangers to which they are expos'd. And it is certainly better to enrich the Subject by ſuch a Licence than among ſo many Subtletys and *Ambiguities* to ſuffer the Enemy to eſcape. Beſides, by a *ſpecial* Statute of *Ja.* 2. (*b*) it is provided in our Law, that no Man ſhall violently deprive a Souldier of his



(*b*) Parl. 12. Cap. 53.

Captive, or any Thing he is poſſeſs'd of, which plainly ſhows that our Anceſtors look'd upon Poſſeſſion as the only infallible Mark of Dominion acquir'd in *War*, and underſtood it to be only ſo far acquir'd as the thing it ſelf was actually poſſeſs'd.

Fifthly, *My Lord*, Altho' *actual* and *natural Poſſeſſion* were not abſolutely neceſſary, yet it cannot be deny'd that the firſt *Aggreſſor* ought then only to be preferr'd when the Purſuit is eaſy. *Inſtit. de rer. div.* 'The Swarm of 'Bees alſo which flew out of your 'Hive is only underſtood to be yours, 'as long as they are within your 'View, and the Purſuit of them is 'not difficult, otherwiſe they apper-'tain to him who has firſt the good 'Fortune to catch them.". Upon which Account, the *Civilians* acknowledge, that the Difficulty of the Chaſe intirely cuts off all Hopes of Domini-

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on. And this *Decision*, in my Opinion, has pleas'd our Lawyers, upon this Consideration, because it was more adviseable to suffer the Prize to fall into the Hands of one Subject than intirely to baffle their united Attempts, while every one of 'em was render'd uncertain and insecure of his Right. And if this Difficulty of Pursuit could transfer the Dominion, even of these Things which are our own, how much more can it hinder the *Acquisition* of those Things which still retain their Liberty and Freedom? In our Case it is evident, and shall be made out and *instructed*, by convincing Proofs, that this Ship could have escap'd and got out of the *Pursuer's* Reach, or at least, that the Pursuit of it was very difficult; for it sail'd faster than a Ship which is swifter than this, *and he who overcomes the Man that has vanquish'd me, does in Effect overcome me also.*

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Besides, the *Pursuer* was hinder'd by taking other Ships; and if we'll be pleas'd to compare the Celerity and Expedition, with which this Prize first fled away, with the Distance at that Time between it and it's Shore; it will plainly appear, that it was impossible for him to have render'd himself Master of her. And this further appear'd from the Testimony of some Mariners that belong to a Ship of our Allies the *French*, which beheld the Engagement. By which Proofs the *High Admiral* (whom we must needs allow to be the ableſt Judge in these Matters) was so fully convinc'd, that he *adjudg'd* the Prize to Captain *Rankin*; so that the Authority of a Sentence is added to the Arguments we have already adduc'd.

*My Lord*, As to the Arguments of our *Adversarys*, it is answer'd, that a treacherous Interposition does not deprive

deprive one even of the Hopes of Dominion. I do indeed acknowledge that many Things are lawful in their own Nature, which we are not allow'd to do out of Spite and Malice to our Neighbour, and that Treachery does very much *vitiate* a Man's Right and Title. And therefore the *Laws*, *Authoritys* and *Decisions*, adduc'd by our Adversaries; do not at all concern us, since they presuppose a treacherous Interposition, whereas we used no Fraud at all. We have nothing to do with the *Jewel* that was carried off by him who first perceiv'd it, nor with him who disappointed the wearied Industry of the first Hunter, nor with the *wild Beast* that was wounded at a Distance but not catch'd, since in our Case, the *Ship* did not receive any Shot of the Enemy. So that our *Adversarys* cannot be prefer'd unto us, even according to the Opinion of

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*Trebatius* (altho' it is *repudiated* by our Law) since the Prize had not sustain'd any Dammage by their Cannon, which yet does not render a Ship so unfit for Flight as Wounds do a wild Beast. But such a Case would indeed somewhat concern us, if we suppose that two Persons, in different and opposite Roads, chance to discover the same *Jewel*, of which he would certainly acquire the Dominion who first took it up, altho' he perceiv'd it last. And 'tho he who was digging a Treasure & employ'd in its Search, would be mightily disappointed by the Interposition of one, who, being acquainted with his Design, and envying his good Fortune, should in the Night-time, or by any other secret Methods endeavour to prevent him: Yet it is beyond all Colour of Debate, that one who began to dig after him, and knew nothing of the Matter, but pierc'd through

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the oppoſite Part of the Wall, would acquire the Property of the Treaſure; which has a very great Affinity with the preſent Caſe.

For we were ſo far from diſappointing the Induſtry of another, that his Majeſty's Ship was not within View of the Prize when *Rankin* attack'd it, but was at that Time employ'd in taking another Ship; inſomuch that our Prize would in all Probability have eſcap'd, as appears from the Proofs we have already adduc'd. Nor has that Argument any Force which is taken from the *Prevention* of *Juriſdictions*; for in theſe neighbouring *Juriſdictions*, both of them have a previous Right of *Citation*: But this Right is deriv'd from *Priority* of *Diligence*; nor is it preſuppoſed but acquir'd. And then the Teſtimony of *Grotius*, upon which our *Adverſarys* ſo much rely, ſeems, in my Opinion,

rather plainly to confirm than any way to weaken our Cause: For (*a*) 'he requires *natural Possession* in this 'natural Way of acquiring, and adduces the Laws I mention'd before; and in *Numb.* 4 he concludes, 'That any Kind of Possession is not sufficient, 'but that a firm and undoubted one 'is requir'd.' And, which yet seems harder than any Thing I have advanc'd, *he tells us*, 'That these Ships 'only ought to be accounted lawful 'Prizes which are brought into our 'Ports and Harbours, or have continu'd in our Power for the Space 'of four and Twenty Hours." And altho' among those who serve for Pay, the Plunder belongs to the General; yet it is unreasonable that this should obtain against these who get nothing for their Pay but the Prizes they take. And therefore, *Tract. de Maribus*, (*b*) he

(*a*) In lib. 3. Cap. 6. Num. 42. (*b*) C. 4.

he very justly ridicules the Title which the *Portugueſe* claim to the *Indies*, after this Manner: 'But if, to 'have ſail'd thither before others, and, 'in ſome Meaſure, open'd the Way 'unto them, they call this *Occupation*. 'What can be more trifling & inſigni- 'ficant than ſuch a Pretence? Nor can we imagine a Caſe that has a nearer Reſemblance of ours. So that, *My Lord*, theſe Gentlemen plead the *Cauſe* of the *Exchequer*, and we of the *Prince*: They endeavour to increaſe his Riches, which are often uneaſy to the Subject, but we advance his Glory and Renown. And if the Caſe of the *Exchequer* is never ſo bad as under a good Prince, it is then certainly worſt when the Rewards of Glory and Gratitude are brought into the *Treſaury*. Happy and proſperous Government which is ſupported by *Judicatures*, that have more Regard to the Laws than to the

*Exchequer*! Princes are indebted to the *Laws* for every thing they poſſeſs, but by the Increaſe of the *Treſaury* Vices are too often maintain'd. And therefore with *Javolenus* (*a*), I conclude, 'That he is not much in the wrong 'who in doubtful Caſes does readily 'anſwer againſt the *Exchequer*.

(*a*) L. 10. ff. De jur. Fiſc.

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# Third Pleading,

*From the*

# *CIVIL LAW.*

## *Whether the* bare Attempt *is Capitally puniſh'd in the Crime of* Aſſaſſination.

MAY it pleaſe your *Lordſhip*, Let us remove the *Splendor* of this numerous Aſſembly, which this new and ſurprizing Complication of Crimes in the Perſon of the *Pannel* has invited thither; the *Eloquence* of his *Advocates*, whom, much againſt their own Inclination, your merciful Commands

mands have oblig'd to undertake this unaccountable Defence: The *Popular Air* of those that seem to favour his Cause from the Spite and Malice they have conceiv'd at their Magistrates and Judges; and we shall find this *Criminal* naked and expos'd, and loaded with so horrid a Villany, that every Circumstance of it without the Attendance of the rest, might by it self amount to a Crime: a *Clergy-man* handling Arms contrary to the *Cannons* of the Church, a *private Person* attacking a privy Counsellor against the Laws, a *Shepherd* feeding his Sheep, not with Milk, but with Blood, not satisfied with Manslaughter, but premeditated Murder; not contented with a fore thought and contriv'd Villany, but a sacrilegious Crime; so fond of Mischief, and so bold and greedy an Instrument of Wickedness, and so proper for the Commission of the most barbarous and

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unaccountable Actions, that he was not frighted from his Design by the sacred Character of the *Arch-Bishop*, whom he invaded, but in Presence of a numerous Multitude, and in the Face of the Sun he had the Impudence to attempt this open *Parricide* in the Streets of our Capital City. And yet if his Wickedness and Impiety had stopt here, he might have found the Clemency of his gracious Sovereign, even overcoming the Hainousness of his Crime; but this abominable Wretch, looking upon himself as unhappy in his *lucky* Disappointment, did frequently repeat the *absent Crime* in his transported Breast, and greedily insinuated to his accursed Brethren, how desirable, and, good God! How holy a thing it would be to destroy all the *Bishops* of our Church. He was once overcome by the dreadful Consciousness of his

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Crime, and withdrew himſelf from the Puniſhment of it, by a ſudden Flight into foreign Countries, but *God Almighty* brought him back, without any other Guards than divine Juſtice, that ſo the Severity of his Puniſhment might ſtrike Terror into the Wicked, and comfort the Good, being inflicted upon him in the ſame Place where he committed the Crime. Horrid Impiety! Whoſe very Defence exceeds other Crimes; for to affirm that he was induc'd to perpetrate this execrable Villany by the Light of his Conſcience, and the Influences of the *Holy Ghoſt* is in Effect to transfer the Guilt of it upon *God* himſelf, and to make the Avenger of Sin both the Sharer and Author of it, and is not only to commit the Crime, but to *canonize* it, and recommend the Commiſſion of it to Poſterity by the Hopes and Proſpect of eternal Life. As if

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the Divine Majesty which is gloriously surrounded with so numerous Armies of Angels, either were not just, or too long delay'd the Execution of his Justice; and therefore he ought to take up Arms, lest Truth and Sincerity be hidden and suppress'd. I am not ignorant that *God Almighty* inspir'd some under the *Old Testament* with a sacred Revenge and Resentment of Crimes, (in the *Jewish Theocracy*, when he himself was instead of a King unto that People) who are called *Zelotes*, and whose Power, to prevent the Delusion of their Country-Men was confirm'd by unusual Miracles. The first and most eminent Person among them was *Phinehas*; but this Sect so polluted their Zeal by a Devotion that was warm'd and transported to a Degree of Madness, and by committing, upon all Occasions, the most violent Actions of Rapine and

Injuſtice, that *Grotius Annot.* (*a*) tells
'us that the Boldneſs and Impu-
'dence of theſe People, whom *Joſe-*
'*phus* calls *Zelotes*, daily increaſing did
'at length raiſe the Anger and Indig-
'nation of the *Romans* and prov'd
'fatal both to their Temple and Ci-
'ty. But after the *Incarnation* of our *bleſſed Saviour*, *God Almighty* did only make uſe of ſpiritual Arms, and when the Sons of *Zebedeus* call'd for Thunder, *Jeſus* anſwer'd them, *Ye know not what Manner of Spirit ye are of*: And when St. *Peter* had unſheath'd his Sword in Behalf of the *Saviour* of *Mankind* againſt the baſeſt of *Men*. Chriſt himſelf who was *God-Man* rejected that *innocent* Defence, which would have been the Effect of Anger and Reſentment.

But, *My Lord*, Let us now manage the

(*a*) In Act. 7. & 57.

the Charge itſelf, in which we ought firſt to prove that the *Pannel* contriv'd the Death of the *Arch-Biſhop* of St. *Andrews*; that in Order to put his *helliſh* Deſign in Execution, he walk'd the Streets for a long Time with a Piſtol about him, which he aim'd at that *Reverend Prelate*, while he ſat in his Coach; but being ſtruck and amaz'd with the Terror of his guilty Conſcience, he diſcharg'd it with a trembling Hand, and wounded the *Biſhop* of *Orkney* in the Arm, who was next to the *Arch-Biſhop*; upon which he fell ill of a lingering Diſeaſe and died.

Now the *Probation* of theſe Crimes does not depend upon *Witneſſes* or *remote* and deceitful *Preſumptions*, but the *Confeſſion* and Acknowledgement of the *Pannel* himſelf; and that not extorted from him by Racks and Torments, nor inadvertently falling from his Mouth by a Miſtake, but

frequently repeated, and *adminiculated* by a great many *pregnant* Circumſtances ; inſomuch that this Charge and Accuſation of the moſt hainous Crimes is made good and ſupported by the moſt convincing Proofs. *My Lord*, That this Attempt, tho it prov'd ineffectual, ought to be capitally puniſh'd, I contend from this threefold Argument. Firſt, Our Lawyers agree that the Deſign ought to be as ſeverely puniſh'd as the Effect ; and in more hainous Crimes, the bare Attempt is puniſh'd with Death, where the *Criminal* did all that he could, and carried on his Deſign to the utmoſt Act. And this I believe, was introduc'd as well in Favour of the Perſon invaded, as in Prejudice of the Aggreſſor. For the Laws, conſulting the Safety and Security of Mankind, oppoſe the firſt Motions and Attempts of Injuſtice, and have provided for

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us at a Diſtance: Juſt as Men uſually do, who preſerve and protect any thing that is valuable by covering it with many Folds, or with a Wall or Seal: And ſince the Reaſon of puniſhing Crimes is not ſo much becauſe ſuch a Thing is done, as becauſe the ſame Thing is always to be expected from the ſame Perſons; (the malicious Deſign remaining tho' it is not in Execution;) the Laws in atrocious Crimes, have wiſely and prudently ſubjected the bare Attempt to a determin'd Puniſhment, where the will and Inclination is of it ſelf a Crime. And therefore the Emperours *Arcadius* and *Honorius*, ordain'd (*a*) *That the Deſign and Effect ſhould be puniſh'd with the ſame Severity*; and upon this Account they added in the ſame Law, *That the Laws have appointed it*, which we find tranſlated in the *Baſilicks*, and *Paul*

(*a*) L. quiſquis C. ad L. Jul. Ma.

*Paul* 51. *Sent.* 1. expreſly ſays, *That a Man's Deſign ought only to be puniſh'd and not his Actions.* Now this particularly obtains in our Crime of *Aſſaſſination*; upon which Account a *Murderer is defin'd to be one who walks with a Weapon upon Deſign of killing a Man.* (*a*) And in this Crime the *Will is more regarded than the Event.* (*b*) And if the *Laws* of *Infidels* paid ſo much Reſpect to Mankind, having no other Guide than the Light of Nature, and the Dictates of Reaſon; how much greater Care ought our *Law-Givers* and *Judges* to take, who are directed by divine Illumination, and know that Man was form'd and created after the Image of *Almighty God?* For ſince thoſe who broke the Statues and Images of the *Roman Emperors* were condemn'd as guilty of Treaſon; how much more ſeverely do they deſerve to be puniſh'd, who en-

(*a*) L. 1. ff. ad L. Cor. de Sic. C. L. 14. ad L. Cor. de Sic.

endeavour, by *Murder*, to deſtroy the Image of the *King* of *Kings*. But of all Kinds of Murder, there is none, in which the bare Attempt does ſo much deſerve to be puniſh'd as when a Conſpiracy is form'd againſt the *King*, or the *Senators*, in whoſe Place his Majeſty's *Counſellors* have now come; who are therefore by the Emperors call'd *a Part of our Body*. And in this Caſe, the *bare Attempt* is capitally puniſh'd, as appears from *Matt.* (*a*) Beſides, the Attempt is puniſh'd in all Crimes when they are arriv'd to the laſt *Act*. (*b*) And thoſe who will ſeem milder on this Head, require only three Things. 1. That the Aggreſſor has advanc'd to the Step next to death. 2. That it be not his Fault, the Crime is not fully perpetrated. 3. That the Perſon invaded does only eſcape by Chance

(*a*) De Crim. Pag. 7. (*b*) Gothc ed §. conatus co. verr. in Clem. ſi furioſus Num. 6.

Chance. In thoſe Caſes, *My Lord*, it does a Man more Harm to have deſign'd the Crime, than it avails him not to have actually committed it. For altho', when the *Pannel* has not accompliſh'd all that might have been perform'd; ſo that it does not appear whether he would have repented of it, or where he was juſt upon the Point of perpetrating the Crime, but preſently repented and did not do it: Tho' I ſay in theſe Caſes the *Judge* ought to be mollify'd and ſoften'd; yet when the *Aggreſſor* maturely conſider'd of the Murder in his own Breaſt, and accompliſh'd every Thing that was in his Power, and not only carry'd a Piſtol about him with that bloody and barbarous Intention, but with a great deal of Compoſure and Deliberation diſcharg'd it againſt his Majeſty's *Counſellors*: Who can free ſuch a Perſon from the Imputation of this horrid

rid Crime ? And then as to these Things which are objected against us, in Order to prove that an Attempt ought not to be capitally punish'd, they must needs be understood of the bare Endeavour, which did not arrive to the utmost Step, and not of the perfect or consummated Attempt, where the Malice of the *Aggressor* did all that was in his Power, altho' he was not able to effect every Thing he design'd. For this happy Disappointment is not owing to the *Pannel*, but to *God*. Nor does *God Almighty* afford his Favour and Protection to those wicked Persons, who have endeavour'd as much as possible to destroy his Image and violate his Laws; for this would be to arm the Divine Providence against *God* himself. Neither do the Laws, by an *unjust* Clemency, protect those *Malefactors* who break and transgress them; for this would be to preserve

wicked Men to be fatal Inſtruments of Miſchief to Poſterity; that ſo after in one Piece of Villany they have miſs'd their Aim, they may at length perfectly learn to commit it by frequent Endeaours & repeated Efforts. But, *My Lord*, altho the bare Attempt does not in every Capital Crime infer the higheſt Puniſhment, yet in that of *Aſſaſſination*, the *Doctors* unanimouſly agree, that the very Endeavour ought to be puniſh'd with *Death*. And this ſeems to have been introduc'd from a Deteſtation of Treachery; againſt which there is no Manner of Safety or Defence. The *Laws* are eaſily inclin'd to ſpare that ſudden Enmity which ariſes from the Reſentment of real and ſenſible Injuries, or even from the Colour and Shadow of an Affront: But they never pardon a baſe and unmanly Treachery, which has not the leaſt favourable or imaginary Pretence

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of Honour or Juſtice to ſupport or excuſe it. To which our Adverſarys can return no other Anſwer than this, that it ought only to be accounted *Aſſaſſination* when the Murder is committed for ſome determin'd Price, and the *Malefactor* has taken Money for his Pains. And this they endeavour to prove from *Matthæus*, (*a*) affirming that it is introduc'd in this Crime, from a juſt Abhorrence of the abominable Wickedneſs and Covetouſneſs of theſe mercenary Villains; eſpecially ſince the *Saracens* hir'd theſe *Aſſaſſins*, (by Birth *Phenicians*) to the Deſtruction of *Chriſtians*.

But I am not pleas'd with this weak Objection; for this particular Way of puniſhing the *bare Attempt* ariſes from the Deteſtation of the *Treachery* that attends it; and therefore, wherever this is found, the Puniſhment is



(*a*) Tit. 5. Cap. 5. Num. 1. & Clar. c. Aſſaſſin.

incur'd. Nor is it of any Moment to the *Republick*, or the Members of it, whether by the Proſpect of ſome Advantage that may redound to him from the Murder, or by the Hopes of Favour, or ſome determin'd Reward, the *Murderer* has been induc'd to *perpetrate* the Crime. And if the Nature of this Crime were ſtrictly confin'd to the firſt Original and Occaſion of it, *Phœnicians* only who endeavour'd to *Aſſaſſinate* a *Chriſtian* would be capitally puniſh'd for the *bare Attempt*. But all this, *My Lord*, is directly contrary to Senſe and Reaſon: For *Matheus* himſelf diſcourſes to this Purpoſe, 'That he is guilty of the Crime of 'Aſſaſſination who has kill'd a *Pagan*; 'for the *Cornelian* Law regards humane Nature in general, and ſpeaks 'not concerning any particular Set 'of Men, but has Mankind its ſelf in 'View. And thus by retorting his

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'Arguments, we may conclude, that 'he is guilty of the Crime of *Aſſaſſi-* 'nation, who treacherouſly murders a 'Man, without diſtinguiſhing whe- 'ther he was hir'd by Money, or in- 'duc'd to it by the Hopes of Favour, 'and the Proſpect of a Reward. And that this Singularity does not proceed from the Hire, but the Treachery, appears from the ſame *Mattheus.* (*a*) 'Wherefore ſince our Anceſtors have 'look'd upon that Murder, as the 'moſt hainous which is effected by 'Treachery; and ſeeing all fraudulent 'Deſigns are the Marks of a baſe and 'degenerated Mind; againſt which it 'is not eaſy to guard our ſelves, one 'may venture, upon juſt Grounds, 'to affirm, that in this Caſe the bare '*Attempt* ought to be capitally pu- 'niſh'd. Yet this may be ſo quali- 'fied as only to take Place, when a 'Man

(*a*) Page 563.

'Man carries on his Design to the ut-
'moſt Act: As for Inſtance, you laid
'down treacherous Meaſures, and,
'like a Robber, waited for the Ap-
'proach of your Neighbour by the
'Way-ſide; but he had the good For-
'tune to eſcape the Snares you laid
'for him: In this Caſe there is Place
'for an *extraordinary* Puniſhment.
'But he inconſiderately precipitated
'himſelf into them, and you unex-
'pectedly attack'd him behind his
'Back; and he, beyond all Hope and
'Expectation, recover'd his Health:
'In this Caſe there will be Room for
'an *ordinary* Puniſhment. And ſince
'there are Perſons who will be in-
'duc'd to commit Murder, either
'that they may acquire Reputation,
'and gain the Applauſe of the Vul-
'gar; or in Order to deſerve *Heaven*
'for their Pains (being ſeduc'd and
'infatuated by *Heretical* Opinions)

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'it is more just and reasonable to af-
'firm that *Criminals* ought to be con-
'demn'd upon this Account, than be-
'cause they are hir'd to do it by Mo-
'ney, of which very few Instances
'occur. For the stronger and more
'common the Occasion is of perpe-
'trating a Crime, the more severely
'ought the Commission of it to be
'punish'd and restrain'd. Besides, in
'*L.* 5. *& ad L. Jul. majest.* we find
'these Words: Whoever contrives
'the Death of those illustrious Men,
'who are Members of our Council
'and our Court, or of *Senators* (for
'we look upon them also as a Part
'of our Body) or of any that are em-
'ploy'd about our Person; whoever,
'I say, contrives their Death (for the
'Laws command the same Severity
'to be inflicted on the Inclination to
'commit the Crime as upon the Ef-
'fect it self) he shall be capitally pu-

nish'd

'niſh'd, and all his Goods confiſcated 'and belong to the Exchequer. Which the *Greek Scholiaſt* does excellently tranſlate *One that way-lays a Senator. My Lord*, as to the Cuſtoms of the *Romans* in this particular, we may learn them from *Quintilian* who (*a*) concludes, *You have done an Injury; but becauſe it is committed againſt a Magiſtrate, you may be juſtly charg'd with Treaſon.* And ſince the *Kings Counſellors* ſhine by the Splendour and Brightneſs of their *Sovereign's* Rays, and by a Fiction of Law are accounted a Part of his Body; (*as L.* 5. ſpeaks) and in a *political* Senſe are Members of the State, without whoſe Help and Aſſiſtance Nothing of Moment can be perform'd, it is reaſonable that he who attacks a Counſellor ſhould be puniſh'd after the ſame Manner as if he had offer'd Violence to the King him-

(*a*) De Orator. L. 5. C. 10.

himself. As he that hurts any Member of the Body is as severely punish'd as if he had wounded the Head. And by this Contrivance the Laws procure Respect and Veneration to those who are intrusted with the Execution of them, and secure them from the malicious Designs and rash Attempts of the *Vulgar*. But this Accusation is not only founded upon the *Civil Law*, but also on a *special Statute* of our own; for by 4 *Act. Parl.* 16. *Ja.* VI. *the bare Attempt* in invading and attacking any of his Majesty's Counsellors is punish'd with Death. Altho it is answer'd to this *Act*, that it only obtains when the Attack is made upon a *Counsellor*, while he is obeying the Orders of his Prince, as appears from the Statute it self. And therefore, since it is not the Attempt it self, but the *Quality* of it that *infers* Death; according to this Statute the Quality must needs be prov'd.

And this is evident from *Clarus* (*a*) when ‘ the Debate is about the inflicting a ‘ puniſhment, that is ordain'd by ‘ ſome *ſpecial Statute*, it is neceſſary ‘ that all the *Qualifications* concur which ‘ are expreſs'd in it, and 4. *ℓ*. 5. *Num*. 9. ‘ When the Controverſy is concer- ‘ ning the Impoſition of a Penalty pre- ‘ ſcrib'd by ſome particular Act, it is ‘ requiſite in this Caſe that all the ‘ Qualities be prov'd which are menti- ‘ on'd in the Statute, otherwiſe the ‘ Puniſhment ſhall not be incur'd. But, *My Lord*, the Force of this An- ſwer is eaſily remov'd, if we nicely conſider the Matter. For the plain and obvious Reaſon why this Privi- ledge is granted to *Counſellors*, is, that the Laws may ſecure theſe Perſons from Malice and Envy, whom the ſe- vere and impartial Execution of them, does ſo much expoſe unto it. And therefore this Statute ought to be in- ter-

(*a*) Aſſaſſ. num. 2.

terpreted in ſuch a Manner as it may naturally produce this Effect. Now this cannot poſſibly be done, unleſs all thoſe are capitally puniſh'd, who attempt the Crime; altho it is not prov'd that the Aggreſſors were induc'd to do ſo upon a publick Account. For ſince thoſe Emotions are ſecret Acts of the Mind, which do not diſcover themſelves in their Cauſe but in their Effect, they are *preſum'd* to be done upon a publick Account, provided that this Attempt cannot be aſcrib'd to any other Cauſe. As for Inſtance, ſuppoſe a Man were attempting to kill one of his *Majeſty*'s *Counſellors*, he would perhaps be heard if he reply'd, that a mortal and irreconcilable Enmity was between him and the Counſellor upon a private Grudge: But if there is any Colour of *Preſumption*, that it proceeds from a publick Cauſe, as if he attack'd him when he was

discharging his Office and obeying the Orders of his Prince, then this *Quality* is understood by a *Presumption Juris & de Jure*, and is of the Number of those which may be alledg'd, but stand not in Need of *Probation*. And this also is deliver'd to us in the Remarks *ad Clarum* (*a*), where the *Qualitys*, presum'd by Law, may be alledg'd without any other *Probation*. And *Muscard*, (*b*) does plainly inform us, that there is no Necessity of proving a *Quality* when it subsists in the Nature of the Thing. (*c*) And as, on the one Hand, this Statute would be very insignificant, if this did not obtain; for the *intrinsick Quality* can hardly be prov'd, and wicked Men might by a very specious Pretence, conceal their publick Resentment under the Appearance of a private Quarrel: So upon the other, no

Man

(*a*) 4. §. 5. Num. 17. (*b*) Conclus. 1284. or 3. (*c*) Aleat. presump. 3. Reg. Boet. Decis. 118.

Man ought to be diſpleas'd at this Interpretation, ſince it is his own Fault that he falls into this Inconveniency; and he has no Body but himſelf to blame, who did that which he ought not to have done. Which Conſideration does eaſily furniſh us an Anſwer to the *Citations* adduc'd from *Clarus*, for they muſt needs be underſtood concerning theſe *Qualitys* which inhance the Crime, and admit of *external* Proofs: As for Inſtance, a *Riot* committed in *Church* is aggravated by this Quality of it, and more ſeverely puniſh'd; and therefore this Circumſtance ought to be prov'd. *Fratricide*, is more hainous than ordinary Murder; and therefore we muſt prove, that not only a Man, but a *Brother* was kill'd. But in our Caſe, *My Lord*, there are a great many concurring *Preſumptions*, from which this *Quality* may be clearly *infer'd*. For this *Pannel* is of the

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Sect of *Puritans*, who have always maliciously oppos'd the *Episcopal Order*, and whose Writings very often incite People to destroy the *Bishops* as the Enemys of *Christ*; with which Doctrine the *Pannel* was not only infected himself, but also promis'd to all that were acquainted with him, that he would put his bloody Design in Execution: And, which is yet more unaccountable, did afterwards boast, that the Consideration which induc'd him so to do, was, that the *Arch-Bishop* of St. *Andrews*, whom he attack'd, had been the Occasion of the Deaths of some of his Brethren. Which Boast of his, altho' it did not precede the Action it self, does yet abundantly discover unto us the first Motive and Principle of it; especially considering that the *Pannel* cannot alledge any other Occasion of his barbarous Attempt, since he neither knew the *Arch-Bishop*, nor was known

known unto him; being so pitiful and obscure a Fellow, that he was as much below his Notice as unworthy of his Regard or Observation. Since therefore, *My Lord*, Confession is the cleareſt of all Proofs, this *Pannel* cannot make any tolerable Defence, unless he retracts his Confession, and owns that he was guilty of an abominable Falshood, and impudently deceiv'd our Judges; and except he has the Face to deny what he formerly acknowledg'd, and contends that his Confession is not valid, because it was *emitted* before an *incompetent* Judge; since his Majesty's Privy Council, to which he disclos'd this Crime, is not invested with the Power of the Sword, nor allow'd to pass Sentence upon the Life and Death of the Subject. Which trifling Evasion does only more fully persuade me, that he is guilty of the Crime, whereof he

is

is accus'd. And what is more reasonable, than that he who impudently boasted, that, by the *Guidance* of his Conscience, he committed this Crime, should be condemn'd by his own *Confession*, which ought always to be accounted the truest Discoverer and most infallible Interpreter of Conscience. *Confession*, says *Seneca*, (*a*) *is the Voice of the Conscience.* And if we may be allowed to consult the *ancient Fathers* upon this Head, who are the best Guides of Conscience, we shall find St. *Ambrose* instructing us to this Purpose in his 50th Sermon. 'A 'Man may be somewhat excusable 'whom another judges and condemns; 'but that Criminal has no Manner 'of Excuse who is condemn'd by the 'Sentence of his own Conscience. 'What can be juster (says *Tertullian* 'ad *Scapulam.*) that to condemn those guil-

(*a*) Controvers. 8.

'guilty Persons who have acknow-
'ledg'd their Crime, and to force by
'Torments a Confession from those
'who obstinately deny it? This is that Confession which is *inspir'd* by *Heaven*, and *descends from Above*. Other Proofs are *elicited* by Men, but this is procur'd by *God* himself. But that I may return a more particular Answer in the precise Point of Law; I am of Opinion, that *that* Rule, or rather *Brocard*, which informs us, that *extrajudicial Confession*, or that which is *emitted* without the Bench (as Lawyers love to speak) is wholly ineffectual: This *Brocard*, I say, does in my Judgment only obtain, when the Person that *emitted* the Confession, did not behave in a serious Manner, jesting without any Care or Circumspection, and imagining, he would not be bound by any Thing he said; acknowledging no *Jurisdiction* in those, before

whom he made ſo little Scruple to confeſs his Crime. In which Caſe our Law was not willing to ly upon the Catch to inſnare inadvertent People by their careleſs or boaſting Behaviour, and to impute unto them the Miſtake and Raſhneſs of their Tongue for a Crime. But when one appears deſign'dly before the ſupreme Council of the Kingdom, (who by our Law have the Power of inquiring into Crimes) in Order to be examin'd by them, I poſitively affirm that the Confeſſion which is there emitted, does bind the Perſon who makes it. For here the *Pannel* not only did know that his Life, was call'd in Queſtion, which ought to have made him the more cautious; but alſo if this took Place, the Examination which the Law has committed to them, would be very ridiculous and inſignificant. For to what

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Purpoſe ſhould he be examin'd, whom we cannot bind by this Examination? And ſince he who can examine, may alſo receive a Confeſſion, I ſee no Reaſon, why his Majeſty's Council ſhould be call'd incompetent; ſince this Inquiſition is committed to them by our Law. For whatever may be ſaid, where the Confeſſion is immediatly retracted, and the Perſon that has raſhly acknowledg'd his Crime can inform us of his Error, and prove that it proceeded from Inadvertency and Miſtake; yet he is never heard when he cannot acquaint us with the true Cauſe and Occaſion of the Error, he has committed. (*a*) But what need we ſay any more upon this Head? This Confeſſion, emitted before his Majeſty's *Commiſſioner* (who is inveſted with the regal Authority, and repreſents the Dignity and Splendor of



(*a*) Boſs Tit. de Confeſſ. Num. 64.

his Prince) is equal to a Confeſſion made before the *King* himſelf. And yet no Body doubts that one who confeſs'd in ſuch a Manner might be capitally puniſh'd. Since the King has Power of Judging of Life, and Death, and can himſelf exerciſe that *Juriſdiction* which he has granted to others. Let us make a Suppoſition, which has ſome Reſemblance of ours, and put the Caſe that the *Chancellour* of this Kingdom had been barbarouſly ſtabb'd with a great many Wounds and died of them; and that ſome Perſon who bore him a ſecret Grudge, when he was alive, and was accus'd of the Crime, had confeſs'd that he actually murder'd him; ſuppoſe that he boaſted among his own People of the bloody Action he had committed, and being examin'd about this Crime before the *King* in his *Majeſty's* Council, had ſtrengthn'd and confirm'd his

*Con-*

*Confeſſion* : Who is ſo fooliſh or ignorant, as to affirm that this *Criminal* would not be bound by it, in Caſe he were not able to prove that he was either deceiv'd, or had loſt his Senſes?

*My Lord*, The laſt Refuge of the *Pannel*, is that he was induc'd to make this *Confeſſion*, by the Hopes of Pardon, and therefore his *Advocates* move in the Behalf of their *Client*, that he ought not to be ſeverely puniſh'd, upon Account of ſuch a *Confeſſion* ; for they ſay, it is *unbecoming* the Character of a *Chriſtian* Judge to break his Promiſe; *inconſiſtent* with the Majeſty of the Government ; *leſſens* the Authority of the Publick Faith ; and that *Nothing* is more contrary to a true and impartial Diſcovery of Crimes, than to recall a Pardon, by which *Confeſſions* are procur'd. And this they endeavour to confirm by the Authority of *Matthe-*

*us*,

*us*, whose Words are these (*a*) "They 'make a Doubt, says he, whether a 'Confession *elicited* by the Promise 'of Impunity, and the Hopes of Par-'don is sufficient to condemn the '*Criminal*; I answer it is not suffi-'cient; for altho' it is not in the *Judge*'s 'Power, to promise Pardon, and con-'sequently the Prince is not oblig'd 'by this unwarrantable Paction; yet 'the Confession was procur'd by Fraud, 'and that by this treacherous Means 'even the innocent may be insnar'd 'is evident from the Testimony of '*Clarus*, who acknowledges that he 'would not condemn in that Case; 'and from the Authority of *Bossius*, 'who owns that it is safer not to 'condemn the *Criminal* to Death, since 'it cannot be deny'd that such a *Con-'fession* is not so clear and unexcep-'tionable as it ought to be. But, *My Lord*,

(*a*) Tit. de Conf. Num. 16.

*Lord*, Juſtice oppoſes, and the *Laws* contradict this Aſſertion. For *Confeſſion* is the very Voice of Conſcience, and infinitely ſurmounts all the Sentences in the World: And ſince the main Scope and Deſign of Probation is that the *Judge* may be perſwaded of the Truth of what we affirm, who would not be convinc'd by a *Confeſſion* which is emitted without any Manner of Conſtraint; And altho the Hopes of Pardon had appear'd, yet this Conſideration does not leſſen the Crime, Nor does that Perſon, from one that was guilty, become innocent who has once confeſs'd himſelf ſo to be: And therefore ſince the innocent ought only to be abſolv'd, Who can free him, who has confeſs'd the Crime, ſince he cannot ſay, that he is innocent of it? But,

Secondly, *My Lord*, I anſwer that no *Judge* can abſolve a *Criminal*, ſince it

it is the Royal *Prerogative* to pardon a Crime; and if the procuring a Confession by the Hopes of Pardon may pass for a Remission, there is not a Judge of the lowest Rank and most inferiour Jurisdiction, who would not have the Power of forgiving Crimes, since he can receive these Confessions. By which Argument, *Bossius* is induc'd to be of my Opinion, *Lib. de Conf. Num.* 12. And altho a Confession, *elicited* by the Hopes of Pardon, may be said to be *shadow'd* and imperfect, where Threatnings are interpos'd, or the Innocence of the Party can otherwise be prov'd; yet none of these is affirm'd or can possibly be said to have happen'd in this Case.

Thirdly, *My Lord*, Altho' a Confession, procur'd by the Hopes of Pardon, should be allow'd to free a Man from Death; yet this would only obtain

(a) Lib. de Conf. Num. 12.

tain when the Proſpect of Forgiveneſs has *preceded* the Acknowledgement of the Crime. But if the *Pannel* confeſs'd before they treated or agreed about the Hopes of Pardon, it neceſſarily follows, that this *Confeſſion* was not obtain'd by the Proſpect of it. And ſince the Suſpicion of this *Confeſſion* proceeds from theſe Enticements that went before it, becauſe it is probable that he who confeſs'd did not diſcover the Truth, but may be *preſum'd* to have only done it to the End that he might redeem himſelf by a certain Hope from the Reſult and Event of a doubtful Plea: It therefore, in my Opinion naturally follows, that this Confeſſion ought not to be accounted imperfect, which, without the Aſſiſtance either of tormenting Racks, or enticeing Allurements was *emitted* freely and without any *previous* Agreement, which has happen'd in

the preſent Caſe, where it cannot be prov'd that any Hopes of Life were offer'd to the *Pannel* before his Confeſſion, or that it was preceded by any Paction or Agreement. For this not only appears from the Confeſſion it ſelf, which was made without any Manner of Condition, but alſo from the Oath of all the *Judges* who manag'd the Examination, to wit, that the *Pannel*, not only confeſs'd the Crime without any Conſtraint, but was induc'd to do it by the ſecret Conſciouſneſs of his Guilt, with bended Knees and Hands lifted up to Heaven, without any Hopes of Pardon offer'd to him, or any Intreaty made to that Effect. So that, *My Lord*, by his firſt *Confeſſion*, a Right being acquir'd to the *King* and the Publick, whatever was afterwards indulg'd, cannot be call'd a *Quality* of the *Confeſſion*, but a Pardon of the Crime; and it muſt needs

be

be allow'd, that the Remiſſion of Crimes depends upon his Majeſty alone. Now to what Purpoſe do our Adverſarys contend, that a *Quality* cannot be ſeparated and divided from the *Confeſſion*, ſince the *Confeſſion* it ſelf has no *Quality* annex'd to it; ſince no Hope of Pardon, no Promiſe of Impunity is contain'd in it: And then as to the *Act* of the *Privy Council*, in which this Proſpect of Pardon is ſaid to be comprehended, an Anſwer is very eaſy and obvious; for that *Act* did not precede the *Confeſſion*, and conſequently the *Pannel* did not confeſs his Crime, in Hopes of obtaining the Pardon which is expreſs'd in it. But that this impertinent *Sophiſm* may intirely be remov'd, and the very Foundations of it deſtroy'd, I ſhall make bold to acquaint your Lordſhips, that the *Pannel* never propos'd to himſelf the Hopes of Pardon, and that they who

examin'd him, never offer'd it unto him: But that afterwards, leſt the falſe Report of this Hope ſhould too much prepoſſeſs your Lordſhips in Behalf of the *Pannel*, or might occaſion any Umbrage or Suſpicion in this Court, his *Majeſty's Counſellors* thought fit to publiſh this *Edict*, in which the Hopes of Pardon which were afterwards indulg'd are only narrated in a tranſient Way: And in the *Act* it ſelf, they conclude that the *Pannel* has loſt the Benefit of it, becauſe in this *Court* he *retracted* his *Confeſſion*; ſince no Hopes of Pardon were *decreed* unto him, if he deny'd what he had formerly acknowledg'd, that he might be wholly abſolv'd; but that by the Repetition of his *Confeſſion*, an Arbitrary Sentence might be confirm'd againſt him. So that neither was Pardon the Intention of the *Act*, ſince we ought not to found any Arguments upon *Edict*

*dicts* beyond their true Scope and Design, nor in any *Act* can those Things which are connected be separated, as our Adversarys are pleased to alledge. *My Lord*, no Lawyer was ever so mad, as to *affirm*, that *Confession* is of it self ineffectual, when it is procur'd by the Hopes of Pardon, if the *Pannel* was convicted by other Proofs; for these remove the Suspicion and *Presumption* that arises from the Allurements and Circumventions of the *Judge*. (*a*) And in this Case, *Presumptions* that are strong and pregnant oppress the *Pannel*, who confess'd freely and without any *preceeding* Hopes or Prospect of Pardon. But in our particular *Fact*, there was never any other Person accus'd of this Crime, and this Man was accounted guilty of it by the publick *Suffrages* and unanimous

(*a*) Jul. Clar. Quest. 55. Num. 9. Cui. l. Præsent. c. de his qui ad Eccles. confugiunt. Alciat. in l. Nat. ff. de verb. signif.

mous Conſent of the People. This is the Man, who by a conſcious Flight has confeſs'd himſelf Guilty of the Crime, being only purſu'd by the Terrors of a diſtracted Mind. This is he, who arm'd with the ſame Piſtol which gave theſe fatal Wounds, walk'd always *incognito*, and among unarm'd Perſons, contrary, not only to the Cuſtoms of his Country, but alſo to the Practice of thoſe of his Profeſſion. And when he was apprehended by the Guards that were employ'd in his Purſuit, he utter'd with a faltering Voice ſo many impertinent, and ſenſleſs, and incoherent Things that the Beholders were eaſily perſwaded that he only was guilty of the Crime. And when he underwent his publick Tryal, he related to thoſe who examin'd him, all the particular Circumſtances of this Action ſo accurately and diſtinctly (when once he thought fit

fit to diſcloſe them) that no Man, for the future, can entertain any Manner of Doubt, about the Author of it. Add to all this, that he frequently boaſted of what he had done: By which ſingle Proof *David*, the meekeſt Prince that ever liv'd, was induc'd to puniſh the *Amalekite* with Death. And altho' no *preceeding* Malice appear'd, yet this *Delinquent* is known to have hated theſe whom he attack'd, to have long before contriv'd their Death, and like a *Herauld*, incited People as much as poſſible to the *Perpetration* of this horrid Crime. Ought we not then to conclude, that this *Confeſſion* which is voluntary, in every Reſpect, *adminiculated* by ſo many ſtrong *Preſumptions*, and ſo often repeated, nor in the leaſt weaken'd by any contrary Argument: May we not I ſay, ſafely conclude, that ſuch a *Confeſſion* is abundanty valid and effectual

ctual to *infer* the Death of one, who by the ſilent *Suffrages* of his own Party, has already been judg'd unworthy of breathing this *Vital Air*.

*My Lord*, If we were ſo unaccountably mad, as to commit the Power of the Sword, to the Rabble and Refuſe of Mankind, who either impiouſly pretend to Religion or inſtead of it are poſſeſs'd with Madneſs and Enthuſiaſm, what Meaſure would there be of Blood, and Slaughter, and what End or Period could we expect to be put unto it? Our Streets would daily be overrun with a *Deluge* of Blood, the Air would reſound with the miſerable Groans and Lamentations of the diſtreſſed, and we would not only fall *Victims* to that Popular Fury unreveng'd, but even unprepar'd; while we ſhould not be allow'd Time or Leiſure ſufficiently to provide either for our Children, or Poſterity, or Eſtate.

ſtate. The more intent any Man were upon the Worſhip of *God*, and the Safety of the Common-Wealth; the ſooner would he be murder'd by thoſe bloody Enemies of *God* and his Country, and the Sword which has already ſo fiercely rag'd againſt his *Majeſty's Counſellors*, when once it were elevated with Succeſs, and accuſtom'd to Cruelty, would ſoon be unſheath'd upon the *King* himſelf, whoſe *Members* they are accounted in a *political* Senſe. So that the Scope and Subſtance of all our moſt earneſt Petitions to your *Lordſhips* at this Time is, that ye would not ſuffer our holy Religion to be polluted with our Blood, nor *that* to be turn'd to the Deſtruction of Mankind, which was deſign'd and invented for a Remedy to humane Nature, and that *that* may not ſerve to deface the Image of *Almighty God*, which was contriv'd to the

End it might be reſtor'd and revived. your *Lordſhips* may be pleas'd to remember thoſe unhappy Times, in which *Germany* was ſo ſeverely rent and torn aſſunder by the Fury of the *Knaperdolians*. For they, from the ſame ſcurvy Beginnings, arriv'd to ſo prodigious and unaccountable a Pitch of Madneſs, that they beheaded their Wives in the open Mercat-Place, in Obedience, as they pretended to the Dictates and Commands of the *Holy Ghoſt*. Your *Lordſhips*, may therefore at this Time chuſe whether you will imitate the miſtaken Zeal of *Peter*, or the Example of our *Bleſſed Saviour*, the infallible *Jeſus*; whether you will follow the furious *Knaperdolians*, or both the *Laws* of all Nations and the *municipal Statutes* of your native Country.

THE

# THE
# Fourth Pleading,
## *From the*
# *FEWDAL LAW.*

*For Sir* Thomas Dalzel *of* Bins, *against the Lady* Caldwel.

*Whether upon the* Subvassals, *being condemn'd for Rebellion, the* Few *so returns to the* King, *that he is not oblig'd to pay the* Subvassal's Debts.

*My Lord President,*

THE Rebels in the Year 1666, being intirely routed by the Bravery and Conduct of General *Dalzel*,

who commanded his Majesty's Forces, he was rewarded, in Consideration of his eminent Services, with the Estate of *Caldwel*; which by this Rebellion, fell to the King. While he is receiving the Incomes of it, he meets with some Opposition from the *Relict* of the Party condemn'd, who contends that the Lands are her's, and cannot be claim'd by the *Fisk*, since her Husband did not hold them of the King, but of the Earl of *Eglington*; and seeing he had not been his Majesty's *Vassal*, they ought not to be confiscated to the King, but should belong to him who is the *immediate Superior* from whom she her self had obtain'd *Confirmation*. And altho' the Right of the guilty *Vassal*, does by Rebellion fall to the King, yet it ought still to devolve with the Burden of that Right which he had transmitted to her, since here his Majesty succeeds in Re-

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gard of his Crown, by his common and univerſal Title, as he is King, but not as *Lord* and *Superior* by a *Fewdal* Right. Between which ways of ſucceeding, ſhe affirms, there is this conſiderable Difference, that when the *Few* returns in the *Fewdal* Way, in that Caſe it muſt needs be acknowledged, the *Few* returns to the *Superior*, in the ſame Condition it was in, when it proceeded from him; and he is not oblig'd to own any Debts, except thoſe which he knows, and (as we ſpeak) has *ratify'd* and *confirm'd*; ſince this is eſſential to the Nature of a *Few*, and is plainly ordain'd by the *Fewdal Law*. But when the King ſucceeds by the Right of his Crown, the Succeſſion is ſo reſtricted by the Common Law, that his Majeſty acquires nothing but what belong'd to the *Vaſſal* himſelf, and is *affected* with thoſe Debts, wherewith he was burden'd: For (ſays ſhe) the

*Fewdal*

*Fewdal* Priviledges were utterly unknown to the *Civil Law*, whoſe Compilers, having nothing but Juſtice and Equity in their View, did wiſely ordain that the Succeſſor ſhould not be capable of acquiring any thing which was not *competent* to the Perſon in whoſe Place he came; that the Crime of Treaſon is not *Fewdal*, but deſcends from the Civil Law; And ſince in all other Caſes, where the King ſucceeds by a common Right, he is always bound to acknowledge the Debts and perform the *Deeds* of the Rebel, as in *Eſcheats* and other *Allodial* Goods, why ſhould it not alſo here take Place, where he ſucceeds in the ſame Manner?

*Secondly*, *A Subvaſſal* (ſays ſhe) is not the King's *Vaſſal*. For the vaſſal of my *Vaſſal* is not my Vaſſal by the Fewdal Law. *Kult.* (*a*) nor can he

(*a*) L. 1. Feud. C. 10. Specul. Tit. de Feud. §. 2. ver. 14.

he *exerciſe* the *Fewdal* Rights upon a *Sub-vaſſal*, *Hern. & Belv.* (*a*) And conſequently cannot force the *Subvaſſal* to ſerve him. (*b*) Nor does the *Subvaſſal* ſwear an Oath of Fidelity to him; (*c*) nor ought he to demand from him the renewing of his Few. And therefore, ſince there is no *Fewdal* Tye between the firſt *direct Superior* and the *Subvaſſal*, the *Few* cannot return in a *Fewdal* Way; nor does the King ſucceed by a *Fewdal* Title, but by the Right of his Crown.

*Thirdly*, Nothing is ſo far remote from Law, and ſo directly contrary to the Principles of Equity and Juſtice, as that the Innocent ſhould be puniſh'd for the Fault of another Perſon: But *Innocence* it ſelf would certainly be oppreſs'd, if the *Subvaſſal* were depriv'd of his *Few* for the Crime of

(*a*) In Cod. 1. §. fin. De controver. Feud. (*b*) Khol. de Subm. feud. C. 4. Num. 38. (*c*) Schrad. 6. Feud. 18.

of his *Superior*, when perhaps he fought againſt his Maſter in the Service of his Sovereign, and a contrary Deciſion would give too great Incitement, and furniſh too ſpecious Pretences to Rebellion: For the *Subvaſſal*, perceiving that he ſhall infallibly periſh by the Forfeiture of his *Superior*; will endeavour, by all imaginable Methods, to prevent his Ruine, and ſeek that Security from his own Valour, while he aſſiſts his *Superior* in his Rebellion, which the Laws would deny him if he help'd his Prince.

*Fourthly*, Among us this more clearly appears, from this Conſideration, that when the *Few* of the Subvaſſal falls to the Exchequer, the King does not immediatly transfer it to the *Donatar*, as if it properly appertain'd to the *Fisk*, but makes a *Preſentation* in Behalf of ſome Perſon, in which he offers the *Subvaſſal* to his *Superiour*. And this

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Way of *evacuating* this Right, as directly contrary to proper *Devolution* is deliver'd in *Act.* 2. *Parl.* 9. *Ja.* VI. By which Law it is provided that the *Few* of the *Subvaſſal* ſhall return to the King: Which ſhows that this *Few* devolves in a *Feudal Way*, and therefore his Majeſty is not oblig'd to pay the Debts of the Rebel. For when the Few returns by a *Fewdal Right*, the *Dominion* is *conſolidated* with the Property, and the *Superior* is only bound to acknowledge thoſe Rights which he has himſelf confirm'd. Now the Scope and Deſign of this Statute, is that the Few of the *Subvaſſal* ſhould return, but not in the ſame Manner as that of the *Vaſſal* does; and that the King can *preſent* to the *direct Superior* of the Rebel another *Subvaſſal*, who may ſucceed to all the Rights that were *competent* to the *Subvaſſal* before he was guilty of high Treaſon:

And ſince the Right of the Rebel's *Relict* did not belong unto him, neither does this Statute ſuffer it to appertain to the Perſon whom his Majeſty has *preſented*.

*Fifthly*, From the ſame Statute it appears that the *Subvaſſals* of the forfeited *Vaſſal* are not oblig'd to *exhibite* their *Writs* and *Evidences* of the *Few* of their Lands, and of their yearly Incomes, to thoſe that are *preſented* by the King; leſt otherwiſe the innocent *Subvaſſal* might be oppreſs'd, and by the Fraud and Obſtinacy of the Superior, that deſpair'd of his Safety, theſe *Writs* ſhould be remov'd to the Prejudice of the *Subvaſſal*, who is ſecur'd by the producing of them; which would be unneceſſary if the Right of the *Subvaſſal* did by the Forfeiture belong to the King.

*Sixthly*, Altho theſe Advantages have often been acquir'd to the King by

by Forfeiture, yet we never find it decided that his Majeſty excluded the *Subvaſſals*; which we ſhould infallibly have more frequently met with, if it had been any Way encourag'd or countenanc'd by our Law. But far be it from your Lordſhip's Intention to ſuffer by theſe trifling Arguments (which do now firſt appear in Publick, and to the Simplicity of our Anceſtors were utterly unknown) the ancient Prerogatives of our Prince, and our Government to be overturned and infring'd. And that we may at one View behold the whole Scheme and Conſtitution both of our own and the *Fewdal Law*, we muſt firſt remember that *Fews* at the Beginning were voluntary and gratuitous Gifts, granted by the *Superiour* who was abſolute *Proprietor* of them, upon Condition of Fidelity and Services to be perform'd, and when the *Superiour* had made

Choice of a fit Perſon, to whoſe Honeſty he might ſecurely commit himſelf, it was the juſteſt Thing imaginable that the *Vaſſal* ſhould not be allow'd to *alienate* the *Few*, and that it ſhould return to the *Superiour*, burden'd with no *Debts* or *Pactions*, to which the *Proprietor* had not given his voluntary Conſent. From whence we may ſafely conclude that it is inherent to the Nature of the *Few* that into whoſe ſoever Hand it comes, the *Vaſſal* cannot affect it with any *Subinfeudation* againſt the *Superiour*'s Will, and that it ought to return to the Donor after the ſame Manner, in which it proceeded from him. Nor can it to any Man ſeem juſt or reaſonable that this gratuitous *Few*, which was granted, in Conſideration of Services to be perform'd ought to be transfer'd to others with whom either the *Superiour* is not at all acquainted or whom

whom he knows to be his moſt violent Enemies. Nor ſhould we accuſe the Law of too rigid a Severity in this Point; for who would confer Benefits on other Conditions, or be ſuch a Fool as to refuſe them upon theſe? And if the *Subvaſſal* did not forſee this Inconveniency, and provide againſt it, it was not the Law but himſelf that did him this Piece of Diſſervice.

*Secondly, My Lord*, Since the *Fewdal Law* has ſtrictly forbidden all *Alienation* that is made againſt the Will or without the Knowledge of the *direct Proprietor* or *Superiour*, it has permitted *Subinfewdation* to be no otherwiſe conſtituted than upon the Conditions of the firſt *Few*, as our Country-Man *Craig* tells us: (*a*) And that his Intereſt may be the better ſecur'd, he acquires by this *Subinfewdation* a new *Vaſſal*, whoſe

(*a*) Page 347.

whoſe Services he may make Uſe of, as often as he ſees Occaſion; upon which Terms *Subinfewdation* is admitted, altho *Alienation* is rejected, as we are inform'd by *Vulteius* (*a*) & *Knoll.* (*b*) from whence *Hottomannus* makes this judicious Remark, *that the Condition of the Vaſſal is very unhappy, who is not only ſubject to this immediate* Superior *but alſo to the firſt.* And unleſs this were allow'd, it would be unneceſſary and ridiculous to admit *Subinfewdation*, and reject *Alienation.* But yet when once we have admitted it, it would be much more abſurd to allow *Subinfewdation* in ſuch a Manner that the *Subvaſſal* could enjoy his *Underfew*, when the firſt Vaſſal was condemn'd for Treaſon, and might retain it, altho he had neither obtain'd *the* Approbation nor the *Confirmation* of

(*a*) l. 1. Cap. 1. Num. 149, (*b*) in C. 1. qual. olim feud. alien. pot. & Gloſſ. ad §. præterea hoc Cap. (*c*) in § illud quoq, 5. Cap. imper. de prohib. feud.

of his first *Superior*. For this is not to have two *Vassals* as *Duarenus* acknowledges (*a*) if both of them are bound by the same Conditions; nor is there any fuller Provision made for him, if in the one Case the *Few* returns pure and free, and in the other no otherwise than with the Burden of the Debts and *Alienations* of the *Vassal*. And from hence also we may conclude that the *Fewdal* Tye is found between the first *Superiour* and the *Subvassal*, which Obligation betwixt them does evidently Appear from the new *Form* of the Oath of Fidelity, prescrib'd in *L. 2 Fewd. Tit. 7. I will be faithfull to my Superior* Caius *against all other Superiors exeept the Emperour and the King*. And among us, as also by the Common Law of *Fews*, if the *immediate Superior* forbears to enter upon his Few; the *Subvassal*, may by a *Fewdal Gradation*, a-

(*a*) De Feud. l. 12. Num. 12.

aſcend to the King as to his firſt *Superior* and become his *Vaſſal*; which alſo obtains among us, when a Man, upon acquiring the *Superiority* or Dominion of his *Few*, imagines he cannot poſſibly get *Inveſtment* of it. Now this could not be done if there were not a *Fewdal* Tye between the King and the *Subvaſſal*, and if thoſe who are our *Vaſſals* were not the *Vaſſals* of our Prince.

*Thirdly*, *My Lord*, The Crime of Treaſon is a *Fewdal Delinquency*, and one of the moſt hainous of them; for we cannot poſſibly imagine a Crime which is more directly contrary to the Fidelity and Alledgiance of the *Vaſſal*. So that why others ſhould be accounted *Fewdal Crimes*, and not this there can no reaſonable Cauſe be aſſign'd. Nay, we are aſſur'd that by the *Fewdal Law* this *Confiſcation* of the *Few* of Rebels, was introduc'd upon this Con-

Conſideration, that the *Superior* might have the *Few* to comfort him, and make all poſſible Repa ration ſo the Crime. For all imaginable Care is to be taken to make up the Loſs of the *Superior* againſt whom the Crime is committed, that ſo ſome Satisfaction may be given him for the Injury done him, and the Dammage he has ſuſtain'd.

And this Method of proceeding in Law (*a*), which was the firſt Cauſe of loſing the *Few*, (*b*) is confirm'd by theſe Words. 'It has been doubted, 'whether, upon the *Vaſſal*'s being un-'juſtly depriv'd of his *Few*, the Ad-'vantage of it belongs to the *Superior* or 'to the Succeſſor of the *Vaſſal*; but 'this Diſtinction is both agreeable 'to Reaſon, and approv'd by Cuſtom, 'that if a *Vaſſal* commits ſuch a Crime 'againſt his *Superior*, as to deſerve



(*a*) L. 2, Feud. Tit. (*b*) Feud. §.

'to loſe his *Few*, the Advantage of it 'ought not to redound to his neareſt 'Relations, but to his *Superior*, that 'he may at leaſt have ſome Repara-'tion for the Injury he has ſuffer'd. So that if we conſider the Subſtance of this Law, we find it deliver'd as a Rule unto us, that wherever the *Superior* is principally offended, by the Crime of the *Vaſſal*, there the *Few* ought to return to the *Superior*, that he may at leaſt have ſome Satisfaction for the Injury done him: But in the Crime of Treaſon, the King is offended and not the *immediate Superior*; and therefore his Majeſty has Title to the *Few*. And this Principle is always receiv'd in other *Definitions* of Law; for the Virgin that is ſet apart for *God*, is comforted after her Rape with the Goods of the Perſon who raviſh'd her, (*a*) and the Portion

(*a*) 1. raptores c. de Epiſt. & cler.

on is return'd to the Father to comfort him for the Loſs of his Daughter who deceas'd in Marriage, that he might not at the ſame Time be afflicted with the double Loſs of his Daughter and his Money. (*a*) *Secondly*, if by this Law the *Superior* is prefer'd to the Brothers, as a Piece of Revenge and Satisfaction for the Injury committed by the *Vaſſal*; and conſequently upon this Account, the ſacred Tyes of Conſanguinity are broken and violated; much more ought the King, who is the firſt Author of the *Few*, to be prefer'd to his *Vaſſal*, who is the *immediate Superior*, and is not injur'd. Our Countryman *Craig* alſo informs us, (*b*) That this Principle of the *Fewdal Law* does generally obtain; where after he has illuſtrated this Fundamental Point, he concludes, From whence, *ſays he*, 'It neceſſarily follows, that in



(*a*) Succurſum ff. De Jur. dot. (*b*) Pag. 373.

'this Caſe the *Few* ought to return 'to him againſt whom the Crime is 'committed: And ſince the Crime 'of Treaſon is committed againſt the 'King; according to the very Rules 'of the *Fewdal* Law, it ought to re-'turn unto him. And, that this is the Opinion of the *French* Lawyers, appears from theſe Words: '*Les droits Feudeaux ont ſeulment ordonne' que le Vaſſal perd ſon fief, lors qu'il a offenſe le delict n'eſt contre Luy & par conſequence la Confiſcation ne luy appartient, mais au Prince pour reparation d'offenſe commiſe contre ſa Majeſte, pour Reverence de laquelle tous les Docteurs limitent les ſtatuts qui veulent que la Confiſcation appartient aux ſeigneurs de fiefs qui n'ayent lieu au Crime de Leze Majeſte.* (a) In *Engliſh* thus, 'The 'Fewdal Laws have only ordain'd, that 'the *Few* ſhould belong to the immedi-'ate *Superiour*, when he is offended by the

'*Vaſſal*

(a) Specul. tit. De Homagio eſt fidel. §. quoniam Num. 63. Oldrad. concil. 17. Guid. Pap. Quæſt. 341.

'*Vaſſal*; but the Crime of Treaſon 'is not committed againſt him, and 'conſequently the Confiſcation does 'not belong unto him, but to the King, 'who alone is capable of being offen-'ded by this Crime. And therefore 'the *Doctors* have thought fit to re-'ſtrict the Statutes which ordain in 'general Terms, That the *Few con-'fiſcated* appertains to the *immediate Superior*. So that if the *Doctors* were of this Opinion, when the *Statutes* ſeem'd to favour the *immediate Superiors*; much more ought your Lordſhip to decide this Affair for his Majeſty, when our own Statutes do not in the leaſt contradict or oppoſe us.

*Fourthly, My Lord*, If the *Fewdal* Law had otherwiſe ordain'd, it would have intirely ſubverted its own Principles. For if the *Few* had return'd to the *immediate Superior* and not to the King, againſt whom the Crime was

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committed, then that *immediate Superior*, would be in Condition by treacherous and hidden *Colluſion* to preſerve the *Few* to the *Rebel*, and tranſmit it to his Poſterity; ſo that the Crime would not be puniſh'd, and the *Few* would be poſſeſs'd by the Enemies of the firſt *Superior*, and an infectious Race of his inveterate Oppreſſors. By this Means alſo all lawful Tyes and Alledgiances would be intirely inverted: For the *Subvaſſal*, and almoſt every Subject, would not depend on the King, but upon thoſe *immediate Superiors*, and would act in Obedience to their Orders, and not to the Commands of their Prince; they would aſſiſt them in Battle, and furniſh 'em their Votes in Time of Peace; and in ſhort, they would always be ſure to be faithful to thoſe Perſons, to whom the *Few* might poſſibly belong. Beſides, thoſe Creditors who lent Money to the

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Debtor when he was engag'd in the Rebellion, and perhaps, in Order to advance his treacherous Designs, would by this Artifice disappoint the Exchequer, altho' the Law has intirely excluded them; that so this Crime, which in Order to the perpetrating of it, requires Money (the Sinews of War) might be depriv'd of its Nourishment; and that the *Superior* might not be burden'd with Debt, which perhaps was contracted to his Ruine and Destruction.

*Fifthly, My Lord,* If by the Crime of the *Subvassal* the *Few devolv'd* to the *immediate Superior*; then it is plain, the *Superior* would not be bound to make good the *Deeds* of the *Subvassal*, and consequently, if by the *Vassal*'s Non-entry a Right were *acquir'd* to the *Superior*, he would not be *burden'd* by this *Subinfewdation* of the Rebel's Relict. So that what Reason can properly be

be assign'd why the *Superior* is not bound in a smaller Crime; when yet he is oblig'd, where a Right is procur'd to him by *Rebellion*, which is the greatest Crime in the World, I must confess, I cannot easily perceive. And since the King succeeds by this Crime as other *intermediate Superiors* do by other Delinquencys, it naturally follows, that since they are not bound to acknowledge the Debts of the *Vassal*, either is he obliged so to do.

*Sixthly*, That the *Few* of the *Subvassal* should return to the King, does not only arise from the *Fewdal* Tye, but also from the Principles of the Law of *Nations* and the *Civil Law*. For so atrocious is the Nature, so great the Barbarity, and so unpardonable is the Treachery of the Crime of Treason, that the King derives his Right at a greater Distance than the later *Fewdal Law*, and the more ignoble Title of

*Few-*

*Fewdal Superiority* and *Dominion*. For there was between the King and his Subjects that intimate Relation and particular Tye, to which the Obligation betwixt the *Superiour* and the *Vaſſal* is only adjected by a new Sort of Contingency and Acceſſion: The one comprehends all within its Boſom, the other contains but a very few. And it would certainly be unjuſt that the King ſhould be bound to furniſh the Expences of the War, and to undertake our Protection, and yet the *Fews* of Rebels ſhould not return unto him, ſince theſe belong to him inſtead of the Plunder, and are the Reward of the Conqueror. Nor is there any Nation in the World ſo ungrateful to their Princes, as not to allow them this Advantage, and not to look upon it as a Recompence juſtly due to them, in Conſideration of the Pains and Anxiety they ſuffer

upon the publick Account. Beſides that it is a Piece of Honeſty and Fidelity which is due to the immediate *Superiour*, and not only is it a certain inferior Kind of Tye, and, as it were, a more imperfect Reſemblance of the Alledgiance which Subjects owe to their Sovereign, but alſo Fidelity is implied in every Obligation of this Nature, and the one follows the other in all the Oaths, which the *Fewdal Law* ordains the *Vaſſals* to take to their *immediate Superiors*.

*Seventhly*, *My Lord*, If the *Few* were confiſcated to the *immediate Superiours*, they would be invited to *lead* falſe *Probations*, and to lay Snares for their *Vaſſals*, which we have leſs Reaſon to preſume or fear from the King, whoſe Riches exclude all Suſpicion of Covetouſneſs, and whoſe Grandeur and Majeſty do entirely baniſh all Apprehenſions of Cruelty. To this may be

added

added that when these *Fews* are by this Confiscation brought into the Exchequer, the publick Revenues are mightily increas'd, and that Money is employed to the Advantage of every particular Person, which was collected from the Forfeiture of private Men. Upon which Account, as the publick Utility should be more regarded than any private Consideration, so in this Case the Princes Interest ought justly to be prefer'd to that of the *immediate Superiour*.

*Eightly*, By the 37*th Act. Parl.* 2. *Ja.* VI. it is expresly provided that the *Subvassals*, who at that Time fought in the King's Service, shall not be depriv'd of their *Underfews*, upon Account of the Crimes of the *intermediate Vassals*; which had been absurd and superfluous, if by our Law these *Subinfewdations* would not have appertain'd to his Majesty by the Re-

bellion of the *direct Superiour*. But yet leſt this Indulgence ſhould be miſapplied and prove of pernicious Conſequence, we find it particularly ordain'd by the 201. *Act Parl.* 14 of the ſame King, that this Grant and Conceſſion ſhall be eras'd from the publick Archives of the Kingdom. If therefore this Indulgence was not granted by our Law, even to thoſe who expos'd their Lives and Fortunes for their Prince, againſt their *Superiours*, who were guilty of Rebellion, what ſhall we ſay, when the Friends of the Rebel, nay when his Wife is ſtill conſcious of the Crime and continuing in the Guilt? And that we may not found all our Arguments upon bare Conjectures, we ſhall adduce a plain Deciſion in Behalf of his Majeſty, in the Month of *May* 1610. in a Proceſs rais'd at the King's Inſtance againſt the Earl of *Bothwel*.

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*My Lord*, It ſeems almoſt ſuperfluous to return a particular Anſwer to the Arguments that are adduc'd for *Subvaſſals* after what we have already advanc'd. For from theſe it appears that the *Subtlety* whereby they contend that the *Few* returns by the Right of the Crown, and not by a *Fewdal* Title is new and unuſual in our Law, and neither valid in its own Nature, nor directly contrary to our Aſſertion, ſince we have clearly prov'd that the *Superiour* and the *Vaſſal* are not only join'd together by the *Fewdal Law*, but the *Vaſſal* is alſo bound to the firſt *Superiour* by a nobler Tye and Obligation. So that when it is written in the *Fewdal Law*, that the *Vaſſal* of my *Vaſſal* is not my *Vaſſal*, and that the remote *Superiour* cannot exerciſe the *Fewdal Rights* againſt the *Subvaſſals*; this muſt only be underſtood concerning *intermediate Superiours*, who are

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alſo Subjects themſelves ; but not at all of the King who is the firſt Author of the *Few*; to whom all Perſons owe Fidelity, and to whom the *Few* returns, free from all the Debts of the Rebels, leſt otherwiſe thoſe who are Accomplices and conſcious of the Crime ſhould be Gainers by it, and therefore this Confiſcation and Advantage is granted to comfort his Majeſty for the Crime committed againſt him, and that his own Subjects might depend upon him, and not, by a divided Fidelity, be diſtracted between their Prince and *immediate Superiour* ; and leſt they ſhould forget their Alledgiance, and upon any Proſpect of Advantage fight for their direct *Superiour*, againſt their King and their Country.

*My Lord*, Beſides theſe Branches of the *Fewdal Law* and thoſe Anſwers of the *Doctors* of it, which make theſe *Subinfewdations* devolve upon the *im-*

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*mediate Superiours*, and not on the first and remoter ones ought to be so interpreted that they may only obtain in these Crimes which are not directly committed against the Prince or the Common-Wealth; as appears from these Words of *Craig*. (*a*) 'But the 'Few, *says he*, when lost for Delin-'quency accresces to the *Superior*, un-'less the King pursues the Revenge 'of an Injury done to himself; for 'then that *Few* also which he holds 'of another *Superiour*, if he is con-'demn'd, devolves to the Exche-'quer. Now that this is plainly the Sense of these Places, we are assur'd by *Speculator*, *Oldradus*, and *Guid. Pap.* in those Passages I have already adduc'd: For as it was reasonable to give the *Under-Few* to the *immediate Superiour*, when the Crime was committed against him; so upon the same Account it

(*a*) Pag. 373.

it was thought juſt that this *Under-Few* ſhould, by the ſame Right, devolve to the King, when the *Subvaſſal* was condemn'd for *Perduellion* and *Treaſon*, ſince theſe Crimes can only be committed againſt his Majeſty. And then in that Caſe alſo wherein the *Under-Few* devolves upon the *immediate Superiour*, he was bound to produce the *Subvaſſal* to the *mediate Superiour*; that ſo he might make ſome Reparation for the Injury he had committed; which, if the *immediate Superiour* was either unwilling or uncapable of performing, then the *Under-Few* return'd to the greater *Superiour*, or the *Superiour* of that *Superiour*. The Text occurs in §. *Illud quoque præcipimus de prohibit. feud. alien. per Frederic.* 'We alſo ordain, that if 'the *Vaſſal* has another *Vaſſal* to his 'Few, and the *Vaſſal*'s *Vaſſal* has offended the *Superiour* of the *Superiour*, 'unleſs

'unleſs he has done it as a Piece of 'Service to the other *Superior*, whom 'he had before, without any Fraud, let 'him be depriv'd of his *Few*, and let it 'return to his *Superiour*, from whom 'he held it himſelf, unleſs upon his 'Demand he is ready to ſatisfy the 'greater *Superior* whom he offended; 'and except the *Vaſſal* and the ſame '*Superior*, being requir'd by his *Supe-* 'rior, crave from him who has offen- 'ded the leſſer *Superior* to make *Sa-* 'tisfaction, let him loſe his *Few*.

Nor am I mov'd, *My Lord*, by the Arguments which are adduc'd for this Statute: For ſince this Law was enacted, in Behalf of the King, and contains *Extenſions*, that are odious in their own Nature, if the Deteſtation of Rebellion had not dictated them, I am ſurpriz'd to find it ſo vaſtly miſapply'd. For who can be ſo far miſtaken, as to imagine that all the Fews,

without any Diſtinction of a *Vaſſal* from a *Subvaſſal*, which the condemn'd Perſon had poſſeſs'd for the Space of five Years, ſhould *devolve* to the King; not only *exempted* from all Burdens, but without any Regard to the Rights of all others, and even of the true *Superior*; and yet that the *Underfew* cannot return any other Way than *burden'd* with the Debts of the *Vaſſal*. Since then it is enacted by the Statute, that when the *Subvaſſal* is condemn'd, the King ought to *preſent* a *Vaſſal* to the *Superior*, who may ſucceed to every Thing which belong'd to the *Subvaſſal*; the Reaſon is, becauſe his Majeſty cannot diſcharge the Office of the *Subvaſſal*, and therefore is oblig'd to *preſent* or *name* another who may ſupply the *Subvaſſal*'s Place, and ſucceed to all the Rights which the King has acquir'd. And the Word (*Belong*) ought here, as every where elſe, to be ſo

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interpreted that the Senſe may be, whatever was the *Vaſſal*'s, to which the Exchequer could ſucceed, intirely belongs to the Perſon preſented. And then, as to the other Branch of the Statute, which provides for the *Subvaſſals*, that they may not ſuſtain any Loſs by the removing of the Diſcharges of their *Superior*, it was only introduc'd from the Conſideration of Juſtice and Equity; leſt they ſhould ſuffer any Inconveniency by the Deed of another Perſon. And this was even neceſſary to them, when the King or the *firſt Superior* had approv'd the *Subinfewdation*: For this Approbation could not poſſibly ſecure thoſe remote *Superiors* from all Action, for not payment of *Few-duty*, and other *reſciſſory Actions*, which are founded on *irritant Clauſes*. Upon which Account, it was thought very reaſonable, by this Statute, expreſly to ſecure the *Subvaſ-*

*ſals* whom it would alſo have protected in all other Points, if the *Legiſlators* had been pleaſed ſo to do. Nor was this omitted through Careleſneſs, but upon Deſign, that the *Subvaſſal*'s being uncertain about their Rights, might aſſiſt their Prince againſt the *immediate Superiors* who endeavour'd to diſturb the State, and might deſerve and incite his Majeſty's Bounty by their hearty Valour, obliging him by Gratitude, when they could not do it by Law; and that they might obtain Confirmation from the King; and ſo all his Subjects might own him to be their *Superior* in every Caſe. And this *Confirmation* ought not at all to be look'd upon as a Burden, ſince the Expences which are requiſite to it are very inconſiderable, and *Confirmation* is neceſſary to other Things, namely, that *Nonentrys*, *Eſcheats*, and other Advantages and the

Casualities, which redound to the Exchequer from the Crimes of the *intermediate Superior*, may be intirely excluded.

If therefore, *My Lord*, the Laws formerly granted this Preference to Kings, that were protected by the Honesty and Virtue of the Age wherein they liv'd, when Religion, encouraging Gratitude, condemn'd Treason as the baseſt of Crimes; why ought not this much rather to be indulg'd at this Time, when Rebellion is transform'd into an Appearance of Sanctity, and has impudently rais'd it self to a ſpecious Reſemblance of Magnanimity and Valour?

THE

# THE

# Fifth Pleading,

*From the*

# *CANON LAW,*

*For the* Magistrates *of the Town of* Haddington, *against the* Earl *of* Haddington.

*Whether when the Parish* modifies *a Stipend to a* Subsidiary Minister, *the Right of* Presentation accresces *to the* Patron *of the* Rector, *or belongs to the Parish, in Consideraiton of the Stipend?*

*My Lord Chancellor,*

THE Church of this Town is one of the richest *Rectorys* of this King-

Kingdom, whoſe *Patron* was the *King*, who ſucceeded in Place of the *Pope*, and granted the Right of *Patronage* to the *Earl* of *Haddington*. But the *Rector*, not being able to take care of ſo many Souls, this Church was liberally *Doted* by the Magiſtrates with a *Subſidiary* Stipend for the Benefit of the ſecond Miniſter; by which *Dotation* they juſtly imagin'd themſelves to be the *Patrons* of this ſecond Miniſter. But when they had *preſented* him according to the uſual Cuſtom, the *Earl* of *Haddington* contends that he is the only *Patron*; for *1ſt*, Since he is the *Patron* of the Church it ſelf, he affirms that he is alſo the *Patron* of this Subſidiary or aſſiſting Miniſter, *becauſe the Acceſſory follows the Nature of its Principal.*

*Secondly*, In a Church, which has a *Patron*, no Man can do any Thing without the *Patron*'s Conſent; and as he,

he who builds any Thing to a Church, does not acquire any Right by that Building, but loſes that which was formerly his own; ſo much leſs can he who has only furniſh'd a Stipend to a Miniſter in that Church, acquire the Right of *Patronage* by this *Dotation.*

*Thirdly*, If the contrary obtain'd, any Body might intrude himſelf into a Share of the *Patronage* without the Conſent of the *Patron.*

*Fourthly*, He contends that it is unjuſt, the building of the Church, which the *Canons* ſuppoſe to be erected by the *Patron*, ſhould be afforded to other Miniſters who were not *preſented* by him.

*Fifthly*, The *Earl*'s *Advocates* affirm, that this was expreſly decided in his *Favour*; (*a*) where *Alexander* the III. being conſulted by the *Arch-Biſhop* of *Canterbury*, who ought to be

*Patron*

(*a*) Cap. 3. de Eccleſ. ædif.

*Patron* of a Chappel that was erected within the Bounds of the Parish Church; Answers, That the *Rector* or the Parish of the principal Church is the true *Patron* of that Chappel. And the Commentary of *Ostia*, in Pursuance of this Decision says, that this is appointed by a certain Right of Compensation, because the Chappel was founded in Prejudice of the greater Church, since that is only a Member and *Accessory* of the Parish-Church, as *Innocent* tells us (*a*). So that the Person who is instituted in it is only the perpetual *Vicar* of the *Rector* of the greater Church; as we find it decided in *Guid. Pap.* (*b*). Since therefore the principal *Patron* and the *Rector* of the *Metropolitan* Church is also *Patron* of the other Church that is different from it, and which another built and doted much more will he re-



(*a*) Lib. 2. Reg. Epist. 137. (*b*) Decis 36.

main the *Patron* of his own Church that was built by himself.

But, *My Lord*, Notwithstanding these Arguments, I contend that the *Magistrates* of this City who alone *modified* the Minister's *Stipend* are *Patrons* of this Benefice; and that the *Presentation* of him appertains to them only, as I shall endeavour to make appear by these Considerations.

*First*, *My Lord*, The Right of *Patronage* it self was first introduc'd, either that by this Consideration, rich Men might be induc'd to found Churches at their own Expences, which so much obtain'd, that whole Kingdoms, being exhausted and impoverish'd by this Madness and *Enthusiasm*, the Emperours were oblig'd to appoint some Measure and Proportion for regulating the Building of Churches, (*a*) or rather from a devote and religious Grati-

(*a*) L. 16 Co. Theo. depen.

Gratitude of the primitive Church (whoſe Prieſts, were at that Time, neither ambitious of ſecular Advantages nor apt to envy and moleſt the Laity) which confer'd this Right of *Patronage*, as a laſting Monument of their Liberality and Bounty. And as we are told in *Can.* 37. *Concil. Tolet.* The Prieſts, who otherwiſe want the Comforts of Life, ought to make this Return of Gratitude to thoſe by whom they are ſupplyed.

But whether it proceeds from the one or the other of theſe Cauſes, we muſt needs in every Caſe conclude, that thoſe Magiſtrates, who alone maintain this Miniſter ought to be gratified by this remuneratory Bounty, and others by their Example invited to the like Liberality. And what Kind of Gratitude demands a Return to be made in his Favour, who contributed Nothing himſelf? This would be by

a *Pious* Ingratitude to transfer my Merits to another Perſon, and to deſtroy the true *Patron* by Hunger, while in the mean Time another was maintain'd with his Food. And if theſe Things were thought neceſſary to the Church in its warm and vigorous Youth, I leave it to your *Lordſhips* to determine what ought to be ſaid in this cold and frozen Old Age of it, when the low Condition, both of our Church and Devotion is too well known.

*Secondly*, *My Lord*, I affirm, that not only he who has built a Church, but alſo he who has *doted* it, does acquire the Right of the *Patronage* of it. For, as *Juſtinian* ſays(*a*), 'If any Man, 'building a Church, or furniſhing an 'Aliment to thoſe who ſerve the 'Cure, brings the Miniſters to the Biſhop.

(*a* Nov. 51. c. ult.

Biſhop. From whence *Innocent* IV. (*a*) affirms that he has the Right of *Patronage* with the Builder himſelf, or even againſt his Will, as if they had both at the ſame Time founded that Church. Since therefore they have furniſh'd the Salary and this *Canonical* Fund, the Right of *Patronage* muſt needs be acquir'd unto them; nor does the former *Patronage* exclude this Right, which proceeds from a new Liberality: Nor does it leſſen the Force of this Argument that theſe *Magiſtrates* have not expreſly reſerv'd the Right of *Patronage* in the *Dotation* it ſelf; ſince every Body knows that the Right of *Patronage* is by *Dotation* legally acquir'd without any Reſervation. (*b*) And the Foundation of it being prov'd, it is not neceſſary to prove the Reſervation

(*a*) Ad Rub. tit. de jure Patronatus. (*b*) Lambert de jur. part. articl. 5. 10. quæſt. 2. part.

vation of the Right of *Patronage.* (*a*) For that theſe Reſervations are neceſſary, ſome new *Doctors* have only affirm'd, being induc'd to do ſo from too ſervile an Adulation of the *Papal* Power, and neglecting the *Bait*, when once they have catch'd the *Fiſhes.* But ſince this is owing to the *Patrons* from a Principle of Gratitude by that *Law* of *Nature*, in which all Remunerations are founded; and ſince it is granted by *Statutes* and *Canons*, we may very juſtly affirm that it is due *ipſo Jure*; *and what is mine by Law needs not be reſerv'd*; nor do theſe Things deſcend to Heirs which are owing from meer Liberality, and not by Law. But this *Right* is transfer'd to Heirs, not only by the *Canon Law* (*b*), but alſo by ours (*c*): From whence *Molinæus* does excellently obſerve: But 'ſo

(*a*) Maſc. car. concluſ. 960. Num. 31. (*b*) Canon. filiuſ. 16. Quæſt. 7. (*c*) Reg. Maj. lib. 3. cap. 33. Num. 7.

'so great a Mistake is it, that the '*Patron* derives his Right of *Patro-* '*nage* from Reservation (as some new '*Canonists* have fondly imagin'd) that 'he possesses it by a primitive Title, 'and as a Part of his ancient *Right* and 'Dominion. Altho' our Country man Sir *Thomas Hope*, requires Reservation, being too apt in this Point as well as in several others to follow the Opinions of the Modern *Canonists*. But whatever may obtain in this Point of Law, my *Clients* could not possibly reserve this Right, because they always retain'd this *Dotation* in their own Power, and from that very Moment, wherein the Provision was made, they have always behav'd as *Patrons*; and therefore it was the Part of the former *Patron*, at the Beginning not to have communicated the Church, and to have vigorously oppos'd the *Dotation*, unless they would intire-

intirely renounce the *Patronage* of their *Stipendiary* Miniſter : Which if they had done, they would either have obtain'd it by a voluntary Conceſſion, or elſe not have beſtow'd this Salary ; and it is more than probable that the *Patron* of the *Rectory* would not have refus'd it, ſince, by this *Dotation*, the Charge of his Miniſter would be extreamly leſſen'd ; and conſequently his Benefice be more deſirable, becauſe this would render it leſs difficult and laborious ; beſides, that it is very agreeable to the Character of a *Chriſtian* to provide as much as poſſible for the ſufficient Care of Souls : And (as *Innocent* the IV. in the Place already cited, affirms) it ought to be a very acceptable Piece of Service to the Founder, that our Church is aſſiſted and ſupply'd by the Bounty of another.

*Thirdly*,

*Thirdly*, *My Lord*, So true is it, that *Posterior Donations* admit us into a Share of the Right of *Patronage*; that from thence proceed these *alternate Presentations*, so often mention'd in the *Cannon Law*, by which the *Patrons* are allowed in their several Turns to *present* the Parish Ministers; and this is call'd a Partner-ship or Society of *Patronage*, by *Innocent* III. (*a*) a Custom which arises from the *Civil Law* (*b*), where the *Servitudes* are permitted to be us'd by the *reciprocal Superiors* in their several Turns. But if the first *Patron* swallow'd up all the *posterior* ones as so many *Accessions*, there would neither be Place for this *Gratification* (since he would be the only *Patron*) nor would there be any of these *intermediate Presentations* going round in such a Circle. Besides, from



(*a*) Lib. 3. Reg. Ep. 226. (*b*) L. quoties 34. de usu fruct.

the ſame Cauſe it has proceeded that there are not only *alternate Preſentations*, but which more nearly concerns the preſent Caſe; one of the *Patrons* has the *Preſentation* of the one, and another has that of another; and therefore in *conventual* Churches, and among us, at this Day in our *Collegiate Kirks*, it frequently happens that the *Prelate* and the *Prebends* have different *Patrons*; which does alſo frequently fall out in Colledges and Univerſities, where the Founder of them does not always *preſent* all the *Regents*; to be ſure, for this Reaſon, becauſe he who has founded the Church or Univerſity was not alſo the Founder of the *Prebends* or *Regents*.

*Fourthly*, *My Lord*, It is a Maxim of Law generally receiv'd among the *Canoniſts*, that the *Patron* ought to be maintain'd by the Incomes of his Benefice, if he is reduc'd to Want; leſt he

he be ruin'd by his own Liberality (*a*) But if these *posteriour Dotations accresc'd* to the first *Patron*, the latter Benefactors would be depriv'd of this Priviledge ; nor in these Benefices would there be any Place for this Maxim ; since the first could not demand this Return, because the Benefit did not proceed from him ; and consequently this *Alimentary Hypotheck* would be very unjust, with Respect to him ; nor could the second have any Pretences to it, because he would not be accounted the *Patron*, and therefore if the Assertion of our Adversarys is true, it would in Justice appertain to none of the two.

For this Priviledge is only due to the *Patron* who is the Benefactor ; and consequently not to the first, because he is not *Patron* ; nor to the second since he is not the Benefactor. And



(*a*) 6. quicunque 16. Qest. 7.

this Difficulty muſt needs extremely incommode us, who by an expreſs Statute, namely of *Ja.* VI. (*a*) have indulg'd this *Priviledge* to *Patrons* that when their Church is vacant without their Fault or Neglect, the Incomes of it appertain unto them. And that this alſo obtains in *France*, *Molinæus* affirms: Nor can we imagine any Thing which is more juſt and reaſonable, ſince the *Patrons* are the Diſtributers of their own Benefits and intruſted with the Cuſtody of their own Churches, when they are vacant. (*b*) But if he who granted the *Donation* is not the *Patron*, he has no Right to this Priviledge; nor ſhould it be indulg'd to him who did not enrich the Church, ſince here is wanting the Reaſon of Gratitude, from whence this Priviledge at firſt proceeded: If therefore the publick Stock

(*a*) Act. 1. Parl. 21. (*b*) Cap. in quibusdam 12 Ext. de Panis, Cap. generali 13. de Elect. in 6.

Stock of this City were exhausted by Debts, would it not be the most unjust and unaccountable Thing in the World that the publick Goods should be expos'd to Sale, and the *Magistrates* themselves impriſon'd, while in the mean Time the Salary, which they granted remain'd in the Hands of the *Patron* of the *Rectory* who gave nothing at all? Would it not be infinitely juſter, and more agreeable to the Principles of *Chriſtian* and Spiritual Gratitude, that in this Caſe the Stipend ſhould not be any longer due; and ought it not to be recover'd from them, by the *Condiction*, *Cauſa data*, *Cauſa non ſequuta*. For ſince this Proviſion was made for the Benefit of the Town, and that it might be a Monument of their Piety, if theſe happen'd to fail, who would chuſe to determine that this extraordinary Piece of Generoſity ſhould be entirely buried

ried in ſo black an Ingratitude? Nor can any *Deciſion* poſſibly extend to more Perſons and to a greater Number of Caſes than this plainly does; ſince there is hardly any City among us, which would not be injur'd by this Determination: For it is now very uſual for them to vye with each other in maintaining theſe *Stipendiary* Miniſters. And to this, the Citizens very willingly agree, becauſe they know that theirs ſhall be prefer'd to all others; and thoſe whom they have advanc'd to this Dignity, will, by their pious and prudent Conduct and Advice, be very neceſſary for managing Affairs, and ſettling Commotions and Diſorders. Of all which Advantages, they would be entirely depriv'd, if this Promotion were in the Power of a Stranger; for thoſe Perſons, who were advanc'd by him, would frequently raiſe and foment Factions

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and Seditions among themſelves, in Behalf of their *Patron* againſt thoſe very Citizens who founded the Church. Nor ought any *Patrons* to be ſo much favour'd as thoſe who are themſelves both *Patrons* and Pariſhioners. Since they are always moſt edified by the Sermons and Labours of thoſe Miniſters whom they have advanc'd to the Cure. By which *Preſumption*, the *Convention* of the *Eſtates* of this Kingdom was lately ſo much convinc'd, that, notwithſtanding the Right of *Foundation*, they granted the Election of the Pariſh Miniſter to the Pariſhioners themſelves. And altho this Statute has now gone into Deſuetude, yet the *Preſumption*, on which it was founded, does ſtill remain, and we are frequently allow'd to argue from abrogated Laws.

*My Lord*, To the Arguments of our Adverſarys, I anſwer, that this ſecond Mini-

Minister does not *accresce* to the principal Benefice of the *Rectory*, but is erected into a distinct Dignity by it self; and that this *Conjunction* seems rather to be a Sort of *Commixtion* than *Accession*, in which Kind of acquiring Dominion, this Rule obtains, that if the Things mix'd together can possibly be separated, the Properties do also remain distinct. In spiritual Matters, we follow Truth rather than Fiction, (*a*) and therefore we ought more to regard the Liberality of the Founder, than the Fiction of this imaginary *Accession*; and since this Church is daily repair'd by these *Magistrates*, and not by the *Patron*, we ought to believe that the Property of the Building appertains to those who are under a Necessity of taking Care of it; and this Priviledge, in Relation to the Minister, is but too small a Return for their Beneficence.

(*a*) Arch. Cap. un. de vot. in 6.

neficence. And altho' at the Beginning the *Patron* was not oblig'd to communicate his Church and furnish them the Use of it; yet we ought not from thence to conclude, that this Liberty being granted unto them, these *secondary* Benefactors renounc'd the Right of *Patronage*, and at most we can only infer from it that the *Patron* of the *Rectoral* Church can yet stop the Entry of a second Minister, but has not the Power of *presenting* him. Besides, methinks, he has acquir'd a Right of preaching in it by a *legal Prescription*, which may obtain in Behalf of one Clergy-man against another, altho' when the Matter concerns Laicks, it is usually call'd in Question; *for one priviledg'd Person is not allow'd to make use of his Priviledge against another*; or at least the Presence and Permission of the *Patron* ought to be look'd upon as his Consent (and certainly if he had ex-

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preſly granted them the Uſe of his Church, there would be no Difficulty in the Caſe) where the Benefit and Advantage of the Church is ſo nearly concern'd; for not only as often as it tends to a Man's Utility, is Silence eſteem'd Conſent, but alſo when it may poſſibly prove to his Diſadvantage, provided the Subject be favourable to the Common-Wealth. Nor needs this occaſion any Umbrage or Apprehenſion to the lawful *Patron*, that his Right can be divided by the violent Intruſion of another Perſon; for it cannot be taken from him without his expreſs or tacite Conſent, unleſs it has Relation to ſomething which is unqueſtionably the Advantage of the Church.

*My Lord*, As to *Cap.* 3. *de Eccleſ. ædif.* I anſwer, that the Right of the *Patronage* of that *auxiliary Chappel* was *adjudged* to the *Patron* of the *Metropolitan* Church

Church (as the *Commentary* informs us) by a Right of Compenſation, becauſe it was founded in Prejudice of the greater Church. But no Inconveniency has befallen the *Rector* by our Proviſion; nor was the Proviſion furniſh'd from his Incomes: For the Matter of Fact was this; a certain Village was ſo far diſtant from their Pariſh *Kirk*, that in the Time of Winter the ſwelling of the Waters did frequently hinder the Pariſhioners from going to their own Church. Upon this they complain'd to the Biſhop of the Dioceſs, and petition'd him that they might be allow'd to build a Chappel or *inferiour* Sort of Church in their own Village. At their Requeſt, *Alexander* the III. order'd a Church to be erected in that Village, becauſe the Principal one was ſufficiently provided by other Funds, with plentiful Revenues, and return'd them this Anſwer,

that the Pariſh Miniſter of the principal Church is the true *Patron* of that *Secondary* one, becauſe he was maintain'd by the Incomes of it. From whence we may ſafely argue, *Firſt*, That the *Patron* of the principal Church is not the *Patron* of the *auxiliary Chappel*, as our Adverſarys ſhould have demonſtrated him to be.

*Secondly*, ſince it is here expreſly determin'd, that the Pariſh Miniſter of the principal Church is the *Patron* of the *auxiliary Chappel*, becauſe that leſſer one was maintain'd by the Revenues of it; it neceſſarly follows, that the Right of *Patronage* muſt be infer'd from the *Dotation*, and does not follow the principal *Patronage* as an *Acceſſion* of it.

And altho' the Conſent of the principal *Rector* is requir'd to the building of a new Church within his Bounds; yet in this Caſe, we find the Conſent

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of the *Patron* is not at all demanded. For, tho this Benefice, whereof he is the *Patron*, cannot be join'd to another *Cure* without his Consent; yet it does not from thence follow that another Minister cannot be added; since in the one Case his Right of *Patronage* is lessen'd, but in the other, he has the sole *Presentation* of his own Parson. And yet even in the former Case, notwithstanding all the Reluctancy and Opposition of the *Patron*, the Bishop, upon a just Account, can without the Consent of the *Rector* build a new Church within the Bounds of the old one, (*a*) because (as *Bengæus* remarks (*b*).) the private and particular Advantage of the *Rector* ought to give Place to the publick Utility of the Church; and therefore we read in *Panorm. Concil.* 105. that the Right of

(*a*) Cap. ad audientiam in fine de. ædifican. & reparan. Eccles. (*b*) de benefic. cur. haben.

of the *Patronage* of the *Altar*, even in a Church, which depended upon a *Patron*, was adjudg'd without any Manner of Reſervation. Upon which Conſideration it has obtain'd among us, that Churches are frequently united, which have different *Patrons*, even againſt their Wills; the *Preſentation* being only reſerv'd to them in their ſeveral Turns; and why ſhould not this be much more granted for the good of the Church? And why ſhould not the Magiſtrates of this City, who ſo carefully provided for the Salvation of their Souls, have the *Preſentation* of this Miniſter, to whom they furniſh'd a Stipend, which is the moſt honourable Thing in the World that a *Patron* can poſſibly be depriv'd of? Eſpecially conſiderirg that the *Patron* of the *Rector* does ſtill continue to *preſent* one as he did before: Nor is any Thing deduc'd for his Benefit from

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the Revenues of the principal *Rectory*. And this is not only more agreeable to the *Canon Law*, but was alſo acknowledg'd to be true by the *Purſuer*'s Grand-father, who by a *Bill* humbly petition'd the *Magiſtrates* of this City that they would preſent his Chaplain to this Benefice. By which *Supplication* he plainly *homologated* our Right; *and what was formerly approv'd by the defunct cannot now be gainſaid or controll'd by his Heir*. Nor can it be objected to us with any Grace, that the *Writ* it ſelf has periſh'd, during the Space of ſo long and troubleſome a Time; and that now it cannot be prov'd but by the publick Records; for who can be imagin'd to have had the Impudence to inroll ſuch a Piece of Falſhood in the Regiſter to the Prejudice of the preſent *Secretary* of this Kingdom, who is yet alive, and lives at ſo ſmall a Diſtance from

from the Place where it was done? If therefore, *My Lord Chancellour*, this honourable Bench will regard the conſtant Strain and Tenor of the *Canons*; if they will have any Reſpect to the pious Gratitude of the Church or to that which may tend to excite others to the like Generoſity; in ſhort, if they will conſider the Cuſtoms of this Place, and the publick Utility and Advantage of our national Church, I make no Manner of Doubt but they will determine this Affair in Favour of my *Clients*; leſt for the future Laicks may look upon all *that* to be entirely loſt, which, out of their Charity, they have given for ſacred Uſes. We cannot poſſibly imagine a more plentiful *Uſury* and Return of our Piety, nor any nobler, or more beautiful and laſting Monument of Fame and Reputation.

THE

# THE
# Sixth Pleading,
## *From the*
# *MUNICIPAL LAW.*

*For* David Melvil, *the Son of the* Lord Melvil.

*Againſt the* Earl *of* Rothes, *the Lord High Chancellor of* Scotland.

*Whether in a* Subſtitution *of many Degrees, the* remoter *Heir, only exiſting at the Time the* Heritage *falls, may ſerve himſelf, or the* poſſible Heir *ought to be expected, becauſe he is nearer?*

*My Lord Preſident,*

ALexander, the firſt Earl of *Levin*, having acquir'd a plentiful E-

Estate by his Bravery and Valour, endeavour'd as much as possible to retain it among his own Offspring, and therefore prefer'd all the remotest *Agnates* of the Family of *Rothes*; but his Grand-child, who died last *infefted* in these Lands, left them to the Heirs of his own Body, who failing to the second Son of the *Earl* of *Rothes*, our *Chancellor*, who was his Uncle; & he failing, to the second Son of the *Lord Melvil*, who married his Sister; and he failing, to the second Son of the *Earl* of *Weems*; and lastly, in Default of all these, to his Heirs and *Assigneys* whatsoever.

From the Time of the Death of *Alexander Earl* of *Levin*, there was not existing, nor is there yet alive any Son of the Lord *Chancellor*: And therefore the second Son of the *Lord Melvil*, by Virtue of a private Destination demands the Estate of his Uncle; since he is the only Person alive at the Time

Time the *Heritage* falls, who is in Condition to enter Heir. This Claim is vigorously oppos'd by the Lord *Chancellor* who contends that the Eſtate is due to his ſecond Son when ever he ſhall exiſt, and that it is not lawful for the ſecond Son of the *Lord Melvil*, to ſerve himſelf Heir as long as there remains any Hope or Proſpect of the firſt. So that from the Form / ~~all~~ this *Subſtitution* / of this Queſtion ariſes, Whether any Perſon can enter Heir, before it appears, whether the *Chancellor* ſhall die without a ſecond Son?

But, *My Lord*, I contend that he only is Heir, who of all the *Subſtitutes* exiſts at the Time the *Heritage* falls; and that we ought not to wait for this poſſible and imaginary Heir, or rather the *Shadow* of one. And this Aſſertion I ſhall endeavour to confirm by theſe Arguments.

*First*, *My Lord*, This Clauſe and Deſtination (*who failing*) as all other Expreſſions of this Nature, ought to be ſo interpreted, that it may be accommodated to the Utility of the Writer: For it is to be preſum'd that every good Father of a Family would in ſuch a Manner have diſpos'd of his Eſtate; for no Man is preſum'd prodigally to throw away his Goods. *And that which was deſign'd for our Benefit, ought not to be turn'd to our Diſadvantage.*

But if the Author of the *Tailzie* had reſolv'd by this Clauſe to make the Enjoyment of his Eſtate depend on the Expectation of a *poſſible Heir*, and to delay it till ſuch Time as he ſhould actually exiſt, he would entirely have ruin'd his Family. For who is ignorant that this Poſſibility may be prolong'd for the Space of 50 Years? The Age and Conſtitution of

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the Lord *Chancellor* give us all the Reaſon in the World to hope that it ſhall be ſo. Now if the *Entry* of the Heir were delay'd for ſo long a Series of Years, while the Eſtate continu'd in this Condition, the Few would return to the King, as lawful *Superior*. And during the Time that the *Few* remain'd in his Majeſty's Hands, the *Annualrents* would increaſe to the triple of the principal Sum; for the Rents out of which they ought to be payed will fall to the King and his *Donatar*. And ſince even the moſt fertile Ground does only equal the Value of the Incomes which ariſe from it in the Space of twenty Years, we may eaſily by a very juſt Conſequence infer, that by this *Subſtitution*, this Family would be irrecoverably ſunk in Debt, before the *future* Heir could *enter* upon the Poſſeſſion of his Eſtate; as if this *Subſtitution* had been made

made rather in Favour of the Exchequer than of the lawful Heirs. Beſides, while this Expectation laſts, there will be no Perſon who ſhall make it his Buſineſs to provide for the *Burdens* & Neceſſity of this honourable Family; no Body will have the Inſpection of the Tutors Accompts; none ſhall defend it from the fatal Periods of *Preſcriptions*, and the malicious Deſigns and Contrivances of its Adverſarys: And in ſhort, there will be none who ſhall have any Title to tranſact with the Creditors, or demand any Thing from the Debtors.

*Secondly*, *My Lord*, That meaning ought certainly to be put upon every Writing, which the Perſon himſelf would in all Probability have expreſs'd, if the Difficulty had been repreſented to him. For what reaſonable Man will make any Manner of Scruple to affirm that the *Teſtator* was unwilling

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to expoſe his Eſtate to theſe Troubles and Inconveniencies? And if any Body, while the *Subſtitution* was read over to him, had ask'd him this Queſtion, Does your Lordſhip intend, by theſe Words, (*who failing*) to ſuffer your Eſtate to remain without an Heir, till ſuch Time as it appears, whether the Lord *Chancellor* ſhall have a Son or not? Whether are you willing that in the mean Time the Few ſhall return to the King; or that the Heir, who is next in the *Subſtitution*, ſhall enter upon the Poſſeſſion of your Eſtate, that ſo the Advantage may redound to your own Family and your own Creditors? Can we imagine his Lordſhip would have return'd any other Anſwer, than this, that he was willing all the *Subſtitutes* ſhould ſucceed in ſuch a Manner as to make no Vacancy or Interruption, and that he ſhould be prefer'd, whom God Almighty

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(who alone has the Power of making Heirs,) ſeems to have choſen for that End; and who having the good Fortune to exiſt at the Time the *Heritage* fell, did intirely exclude all Uncertainty, together with theſe poſſible and imaginary Heirs? And this Interpretation is excellently adapted to all humane *Deeds*, & particularly to *Subſtitutions*. For the great Deſign of theſe is to preſerve Families; *Subſtitutes* being choſen rather to repreſent the Family of the deceas'd Perſon, than to be enrich'd by it themſelves. Now that the *Defunct* propos'd to himſelf this End in his *Subſtitution* will appear, if we conſider, that in the Diſpoſition of his Eſtate, he made it an expreſs Condition, that the *Subſtitutes*, altho they were *infefted* in it, ſhould be bound to reſtore this *Fiduciary Heritage*, or (as our Lawyers ſpeak) to *denude* themſelves in Favour of the remoter

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*Subſtitutes*, if the Eſtate of ſome richer and more ancient Family were left unto them.

*Thirdly, My Lord*, If this Expectation of a future Heir were render'd abſolutely neceſſary, a great many ridiculous Abſurdities would be conſequent upon it. Let us then ſuppoſe that the youngeſt of three Brethren left a plentiful Fortune to the ſecond Son, yet unborn, of his Elder Brother; and in Default of him to the ſecond Son of the ſecond Brother and burden'd them with the Payment of the Portion, of his Daughter *Seia*: Would it not be the moſt unreaſonable thing in the World that the Daughter of the *Teſtator* ſhould be unfurniſh'd of a Portion till ſuch Time as the ſecond Son of the elder Brother were born. For the *Donatar* being neither oblig'd to afford Aliment nor Portion, the young Lady, by

the Want of a ſuitable Proviſion, would not only be depriv'd of all Hopes of Marriage, but be alſo in Danger of loſing her Life. And how much would thoſe Perſons be diſappointed who ſhould leave in Legacy the Annual-Rent of a Sum to their aged Uncle or Step-Mother, if the Heir expreſs'd in the *Tailzie* by ſuch an Expectation were eternally uncertain.

*Fourthly*, *My Lord*, This would not only tend to the Deſtruction of the *Defunct*, and his Heirs, but alſo of his lawful Creditors. For while the Condition was delay'd, ſome Creditors would be unjuſtly depriv'd of their principal Sums, without which they cannot poſſibly maintain their Trade; and others would want their Annual-Rents, whereby they muſt needs ſupport themſelves, and their Families: Parents would not be able to educate their Children, nor Children in a Condition to maintain their Parents: The

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Republick would languiſh without Trade and Commerce, and private Fortunes without ſufficient Funds for their neceſſary Expences. And which, is the Source and Fountain of all Manner of Injuſtice, this *Deciſion* would unluckily furniſh an Occaſion of defrauding Creditors and ruining them entirely, for aſſoon as the Debtor perceives, he is become Bankrupt he may ſo order Matters that, by this Delay, the *Few* ſhall unavoidably fall to the King; and yet at the ſame take Care that the Advantages of the *Few* be transfer'd to his *Fiduciary* Heir. And altho, when Confirmation is obtain'd from the *Superior*, the Creditor may defend himſelf againſt *Wards* and *Eſcheats*, and even Treaſon itſelf; yet in this Caſe Nothing remains that can poſſibly afford him any Manner of Aſſiſtance. Which Conſiderations and others of the like Nature do ſuf-

ficiently demonstrate the Injustice and Severity of this Sentence.

*Fifthly, My Lord*, Not only a great many Inconveniencies and Absurdities, but an infinite Number of inextricable Difficulties would be occasion'd by this Delay. As for Instance, if the Son of a Sister or any other Woman had been *substituted*, as in this Case was the Son of the Countess of *Weems*, then since the Time wherein Women are accounted fit for bearing Children is very uncertain, it could not possibly be determin'd when the *Substitute* of the remoter Degree ought to enter Heir; nor can Heirs be properly said to fail, as long as Nature is not acknowledg'd so to do. And altho Nature does not usually permit Women to bear Children after their fiftieth Year, yet lest she should seem to be confin'd by too narrow Bounds, she indulges some this Priviledge even beyond

yond their ſixtieth Year, and is unwilling that Rules and Reſtrictions ſhould be impos'd upon her by thoſe who ought rather to obey the Laws ſhe enacts.

*Sixthly*, *My Lord*, This Expectation of a future Heir would oppoſe the Rules of that Succeſſion which deſcends from the *Civil Law*. It would be contrary to the *Feudal* Succeſſion to the *proviſional* and *qualified* Succeſſion which we call a *Talzied* one, to the Nature of the *Few*, and to the common *Stiles* and *Forms*, by which Heirs among us are call'd to the Succeſſion; nor does the Nature of Dominion admit of this Suſpenſion and Delay. As to the Succeſſion, which deſcends from the *Civil Law*, where it follows the Call of Nature and is not diſtracted by any Conditions, the Father ſucceeds to his only Son, altho there is ſtill a Poſſibility of his begetting more

more Children. But if it were true that future and imaginary Heirs could exclude thoſe who are already born, then they would exclude their Father; ſince Brothers are always prefer'd to the Father. And juſt ſo, if only a Siſter is alive, ſhe ſucceeds to the whole Eſtate of her Brother, altho the Father may beget another Brother to the deceas'd Perſon, who, if he exiſted, would infallibly exclude the Siſter. To this may be added, that even in *Moveables* theſe *allodial Goods* are divided between three Brothers, whom we ſuppoſe to be alive, altho their Father not being yet dead, other Brethren may be expected.

From all which Examples it appears, that Children already born, ought, by the common Rules of Succeſſion, always to be prefer'd, and not thoſe who only exiſt in Hope and Imagination. And from thence alſo we may very

very justly argue, that this Order should be admitted among *Substitutes*, if nothing appears in the *Tailzie* or *Disposition*, which, by an oblique and irregular Clause, may oblige the Judge to neglect it; but in this Case no such Thing can be alledg'd, and therefore the aforesaid *Series* ought certainly to obtain.

*Seventhly*, *My Lord*, In a *Tailzied* Succession, wherein the *Substitutes* are admitted, according to the Order in which they are appointed, it is the justest Thing in the World to bestow the Estate upon those who are alive, and not to wait for Children who are yet to be born. For *Substitution* was introduc'd in Law, upon this Account, that the *Defunct* might have one to represent his Person, and manage his Estate: But a Man cannot be represented by one who does not exist; *For that which is not in Being does*

*does not admit of Qualities.* And from the Nature of the *Subſtitution*, that Interpretation ought to be put upon this Clauſe, which leaſt incommodes the *Teſtator*, and is leaſt contrary to the *Few* it ſelf: Nor ought we to wait for a future Heir, when the Expectation of him would leave the *Teſtator* without a *Subſtitute*, and the *Few* without a *Superior*. And ſince the main Scope and Deſign of *Subſtitutions*, is that one of the *Subſtitutes* may always ſerve himſelf Heir; it were certainly the abſurdeſt Thing imaginable to put that Interpretation upon a *Subſtitution*, which would neceſſarily occaſion the Want of an Heir. And therefore, among us, the living Heir of the *Tailzie* is always prefer'd to him, who is yet to be born; as we find it happen'd in the *Earl* of *Roxburgh*'s Caſe, who ſucceeded as Heir of *Tailzie* to his Son; altho' his Children that were

were yet to be born, (if there were any Place for such imaginary Heirs) would have intirely excluded him. In which Point, our Customs exactly imitate the *Civil Law*: For, as the Learned *Vinnius* does excellently observe, 'That an *Institution* may be valid 'and effectual, it is necessary, the *in-* 'stituted Heir be *capable* at the Time 'of the Death of the *Testator*; nor 'do the Principles of Law permit it 'to be otherwise. And if he is in- 'capable at the Time of the *Testa-* 'tor's Death, it is to no Purpose to 'enquire into his *Capacity* at the 'Time of his *Entry*. For he who is 'not *capable* at the Time of the Death 'of the *Testator*, altho' afterwards he 'is *capable*, cannot possibly acquire a 'just Title to the Estate (*a*). At which Testimony those Persons ought to be silent, who fondly expect future



(*a*) L. si alienum, ff. 1. de Hæred. Institut.

and imaginary Heirs, in direct Oppoſition to the Principles of Law.

*Eighthly, My Lord,* The *Brieves*, by which the King appoints lawful Heirs to be acknowledg'd or *ſerv'd* (as we ſpeak) command the ſworn Men of *Inqueſt*, to enquire who is the neareſt lawful Heir to the deceas'd Perſon, but never who may poſſibly be Heir; nor does our *Stile* admit any *Forms*, whereby Creditors, during ſuch an Expectation, may recover their Debts, altho' ſufficient Remedies have been provided againſt exiſting and apparent Heirs: Nor have any of our Lawyers ever invented a Clauſe, whereby they might prevent this falling of the *Few* into the King's Hands, upon Account of *Nonentry*; againſt which they would infallibly have provided, if they imagin'd, that by this Form (*who failing*) the *Few* would return to his Majeſty by *Nonentry*, while the poſſible and

future

future Heir is expected. And on the other Hand, the King's *Advocate* and *Solicitors* would never have omitted to bring into the Exchequer the Advantages which arose from this falling of the *Few*; if by this Interpretation *Nonentry* were due, during such a Delay. But tho' Opportunitys of this Nature have been often presented, yet this Advantage was never claim'd by the Exchequer.

*Ninthly, My Lord*, This Delay of the *Entry* is also contrary to the Nature of the *Few*: For a *Few* is a mutual Contract, in which the *Superior* and his *Vassal* are so reciprocally oblig'd to each other, that the one cannot hurt the other without his Consent; and the Nature of the *Few* cannot be chang'd by any private *Pactions*. But if this *Clause* were so explain'd, that the living Heir could not *enter*, as long as there remain'd any Possibility of a future

future one, then the *Superior* would not have a *Vassal* to perform the *usual Services* due to him for his *Few*; in Consideration whereof *Fews* were originally granted; nor could the *Few* be *affected* by *Forfeiture* or *Escheat*. For there would not be any *Vassal* by whose Crimes the *Few* might fall; and instead of that nobler and more profitable Casuality, by which the *inferior* Sort of Dominion is *consolidated* with the *direct*, nothing but the bare *Entry*, would *accresce* to the *Superior*; from which, before *Declarator*, those imaginary Incomes, which we usually call *retour'd Dutys* would be only due; and even of these the *direct Superior* might be depriv'd by the *Vassal*, if he took Care in his *Disposition* to reserve the Rents of the Lands to a possible and future Heir. And as the *Vassal* cannot transmit and *alienate* the *Few* by perpetual *Tacks* and *Life-Rents*,

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leſt the *Superior* ſhould be depriv'd of his juſt Advantages; ſo neither by this *Clauſe* can he poſſibly introduce this Delay, leſt the *Superior* ſhould want a *Vaſſal*, and the Dominion be attended with no Manner of Profit. Nor will the *Subvaſſals* of this future Heir, during this Dependance of the *Few*, be permitted to enter and be acknowledged or inveſted by their *Superior*, and conſequently the *Feudal* Rights which ~~ſhall~~ obtain among us will be very imperfect.

*Tenthly*, *My Lord*, Theſe Words, (*who failing*) are equivalent, and may be reſolved into this Clauſe (*Children not exiſting*,) but the Clauſe, *not exiſting*, is only *verified* concerning thoſe who are alive at the Time the *Heritage* falls; for Words of the preſent Time, ſuch as theſe (*Not exiſting*) neither *draw* nor *include* (*a*), where we

(*a*) L. ſi ita ff. de annuis Legat.

we are told that in Legacys the present Time ought always to be regarded, if some other Thing is not comprehended by it: And therefore they ought not to be *drawn* to the future Time against their Nature; for a Quality added to a *Verb*, is always understood according to the Tense of the *Verb*(a).

*Eleventhly*, *My Lord*, In no Succession can the Dominion be uncertain, or *in the Clouds*, as the *Doctors* speak. For *Law*, as well as *Philosophy*, abhors a *vacuum*; and therefore has order'd the lawful Owners to be acknowledg'd, that so Debtors might know to whom they may pay securely, and Creditors, from whom they may demand their own: And, in short, that every Thing may have a Master to maintain and preserve it. And this Interpreters think was enacted by *L. ult. ff. Com. Præd.* The last Words where-

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(a) Everard. Cons. V.

of are these: 'For altho' the Acts 'of the living are frequently delay'd 'and suspended, yet this does not 'obtain in the *Deeds* of deceas'd 'Persons. 'The *Heritage* (says *Stockmannus* (*a*), cannot be uncertain after 'the Death of the *Testator*; and consequently cannot appertain to any others than those who are already 'born (*b*). All which is confirm'd 'by *Fusarius* (*c*), and *Everard* (*d*), who 'expresly tell us, that he is look'd 'upon as lawfully call'd to the Succession, who is found to be such at 'the Time the Condition is fulfill'd, 'and that Person ought not to be regarded who either never existed, or 'else deceas'd before the Day of the '*Fidei Commis.* came. For in all *conditional Dispositions*, the Qualifications

(*a*) Decis. 26. num. 7. (*b*) L. 1. §. 1. sciendum, ff. de suis & legitim. L cum ita §. fin. ff. de Legat. 2. §. proximus instit. de legit. Agnat. succes. (*c*) de Fidei Com. quæst. 318. (*d*) Cons. V.

‘ tions in the Heir ought to be in him
‘ at the Time the Condition is ac-
‘ compliſh'd, without any Regard to
‘ that which he might poſſibly be poſ-
‘ ſeſs'd of when he was invited to
‘ the *Heritage*. Hence it is, that *Pre-ſcriptions* are introduc'd againſt the Principles of Law, leſt the Propertys of Things ſhould be uncertain: And, upon this Conſideration alſo it is that the *Heritage* is never left from a certain Day, nor untill one: But in ſuch Caſes the Defect of the Time is remov'd, and the *Inſtitution* remains; and hence the Poſſeſſion of the *Heir* and the *Defunct* is ſaid to be continu'd without any Manner of Interruption. But none of theſe could be firmly eſtabliſh'd, if ſo great a Diſtance were interpos'd by this Uncertainty; for the Dominion and Property muſt needs be doubtful, and the Poſſeſſion of the Heir could not poſſibly be join'd to that of the

*Defunct*

*Defunct*, when there is no living Heir to continue this Poſſeſſion. And if the Acts of deceas'd Perſons cannot be ſuſpended, we may ſafely conclude that a *Subſtitution* ought not to be delay'd. From all which Conſiderations, it ſufficiently appears how much our Aſſertion is founded upon the Principles of Law, and how agreeable it is to the perpetual Strain and Tenor of it.

*My Lord*, Our Adverſarys being ſenſible how much this univerſal Conſent of *Doctors* which is ſo plainly on our Side, does incommode their Cauſe, find Fault with theſe *Definitions* of the *Civil Law*, as refin'd Subtletys that are of no Weight or Conſequence: As if this antiquated Doctrine of the Schools ſhould not defeat the ſacred Deſigns and *Deſtinations* of *Teſtators*, and ought not to be compared with them. For how dangerous and ab-

ſurd would it be, ſay they, to ſubmit the Laſt *Wills* of deceas'd Perſons to the Subtletys of Lawyers; and by this Means to render them uſeleſs and inſignificant. That he who is invited by the *Defunct* to the Succeſſion in the laſt Place, ſhould, according to theſe Lawyers, obtain the firſt. Nor can the Order of nominating Heirs be to any Purpoſe, ſince by this Means all Order would be intirely confounded. So that altho' there is a certain Method and Gradation invented of calling and nominating Heirs, that ſo dying Perſons may have the Satisfaction to know what Heirs ſhall ſucceed them, and the Order in which they will do it; yet if theſe Subtletys are permitted to obtain among us, it will be impoſſible for a Man to know who ſhall be his Heir. And it will frequently happen that a Grand-child, by one of our deareſt Sons ſhall be remov'd

mov'd from the Succeſſion, that ſo one may *enter* Heir who is ſcarce related to the *Defunct*, becauſe that Grandchild, whom the deceas'd Perſon principally regarded did not exiſt in that fatal and critical Moment wherein the *Teſtator* died; and ſo this near Relation, as if he were *Thunder-ſtruck*, ſhall ſee his Hopes and Expectation unexpectedly defeated altho he was born, perhaps a very ſhort Time after the Death of the Defunct; and be unhappily reduc'd to beg his Bread, while he ſhall have the Mortification to behold a plentiful Fortune, to which he has ſo juſt a Title, in the Hands of the remoteſt Heir, and of one who is hardly related to him. Beſides, it might fall out that none of the *Subſtitutes* exiſting at the Time of the *Teſtator*'s Death, the Eſtate would devolve to the King as to the laſt Heir. And this Inconveniency they affirm to be more than

all that we have alledg'd, that theſe which ſeem to be in our Caſe, are of no Conſideration, ſince they are meerly accidental; and that nothing is more ordinary in Law, than that many Things daily come to paſs, which ſomewhat incommode our *Subſtitutions*, but are not able to ſubvert and deſtroy them. Nor does the Inconveniency take off the Force of the Argument; for altho' ſuch Hardſhips might probably determine them to be of our Opinion in a doubtful Caſe; yet we ought never to violate Laws, or *Laſt-Wills*, when they are expreſly declar'd. Theſe general Conſiderations being premis'd, they return to our Arguments this particular Anſwer.

To that *Series* of Inconveniencys, which we have diſtributed into five Arguments; they anſwer, That the Judges can eaſily appoint a *Curator* to

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the Goods of the deceas'd Perſon, who ſhall be capable of *purſuing* and *defending* Actions, of adjuſting and taking Inſpection of Accompts, and of managing Affairs: That even the *Few* it ſelf, during this Uncertainty of Succeſſion, may be *adjudg'd* to the Creditors; and the Goods of the deceaſt Debtor be *affected* by *Declarators* and other Actions which have been invented to this Purpoſe. Nor ought we to regard the *Forfeiture*, which ariſes from this Uncertainty; ſince this only happens accidentally and by Chance, and proceeds from the ſame Fountain of the *Feudal Law* with ſix hundred of the like Nature. Beſides, Creditors are no more hurted by this than by *Forfeitures*, *Eſcheats*, *Recognitions*, and other Caſualities, whereby the *Few*, which in our Caſe only returns to the Exchequer for a ſhort Time, in theſe is irrecoverably loſt. And ſince the

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*Gratification* of Creditors does not hinder the Damages which are occasion'd by *Clauses* that discharge *Alienations* and other *resolutive* and *irritant* Conditions, whereby not only some casual Incomes and Advantages, but the *Fee* it self is intirely swallowed up and consum'd? Why should the Will of *Testators* be here inverted; which at least among their Heirs and Relations ought always to be accounted a Law: Especially since the Beneficence of our Sovereign so easily accommodates it self to that which is just and reasonable? And all these Inconveniencies can for the future be prevented by the *Testator*'s nominating a *Trustee*, in whose Hands the yearly Revenues of the Estate may in the mean while be consign'd; which *Depositary* may serve for a *Vassal*, till such Time as a real one shall exist;

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by which Means the Incomes of it will not appertain to the King.

They tell us that our Arguments, drawn from a Succeſſion without a Teſtament to that which is *tailzied* and expreſs, are very inſufficient, becauſe when the Law by Words of the preſent Time, does *purely* invite Heirs to the Succeſſion, we muſt not expect thoſe that are yet to be born, who derive all their Right from the *Nomination* of the *Defunct*, who has neglected the Order of Law, that ſo he might chuſe Heirs to himſelf. And this *Nomination* is ſo exactly regarded by the Law, that we find it expreſly ordain'd, *That as every Man diſpoſes of his Eſtate, ſo the Right of it ſhall remain.* And *the Proviſion of Man excludes the Proviſion of the Law* which does indeed aſſiſt thoſe Perſons who die without a Teſtament, but does not abſolutely govern thoſe who make their

Teſta-

Testaments. And hence it is, that at present, a Man if he pleases may disinherit his neareſt Relation, and appoint Heirs till such a Day, or upon such a Condition. Of which we are presented with a fuller View, *L.* 3. & 69. *ff. De Acquir. & Omitt. Hæred.* & *L.* 16. *ff. De Legat.* 1. Now altho' in the Civil Law the Institution of an Heir was very much restricted, yet they affirm that the present *Municipal* Laws of Nations have receded from that Subtlety of the *Roman* Law; and indulg'd dying Persons a full Dominion over their Goods. And here, as in a great many Cases of this Nature, they tell us that the Customs of our Country prevail over the Laws, having more Regard to Reason and Equity than to the refin'd Subtletys of the *Doctors*. Which plainly appears from *Vinnius*(*a*) & *Grotius*(*b*), where he in-

(*a*) Ad §. 9. Inst. de Hæred Institt. (*b*) Jus Batav. L. 2. C. 18. Num. 38.

informs us that these Subtleties are now gone into Desuetude, and a Testator is permitted to appoint an Heir upon a Condition; which if we take for granted there can be no manner of Doubt that an Heir may be *instituted* till an uncertain Day; for in *Institutions* an undetermin'd Day is always accounted a Condition.

That this Expectation of a future Heir is not contrary to our present *Feudal Law*, they contend by these Arguments. That altho' of old by the Law, purely *Feudal*, a Man could not with the Consent of his *Superiour* either leave the *Few* at his Death in a Testament, or *Alienate* it among the Living; yet now that *Fews* do not proceed from the Bare Liberality of the *Superior*, strangers can be appointed Heirs, upon a Condition, and to a certain Time, whereof an infinite number of Examples may be easily adduc'd; as

for Inſtance, if one reſign'd his *Fee* in Favour of the Heirs that were to be born of his Marriage; who failing, in Behalf of the Wife or Husband, who ſhould prove the Surviver, the Proviſion would certainly be valid; and yet no Body doubts but this *Subſtitution* is made till an uncertain Day; for it is the moſt doubtful thing in the World, whether any Heirs ſhall ariſe from the Marriage, and which of the married Perſons ſhall ſurvive the other. And juſt ſo, if a Man ſhould appoint any one of his Nephews to be his Heir, who ſhould marry the Daughter of the *Teſtator*, and ſubſtitute the Sons he ſhould beget; the *Deſtination* would be valid, altho it is uncertain whether any ſhall marry the *Teſtator*'s Daughter, and who the particular Perſon ſhall be. So that we find Dominion and Succeſſion muſt needs depend on an uncer-

uncertain Event. From all which Considerations, they conclude, that the Property of things can be doubtful and ſuſpended; when, in the *Defuncts* Teſtament, this is expreſly provided; and that *that* Rule does only obtain in the *Inſtitutions* of the Law, and not in the Proviſions of Man; as we are inform'd by *Peregrin*: Nor yet can Dominion be ſaid to be uncertain, ſince when the Heir does not ſerve himſelf, the Heritage repreſents the Perſon of its deceas'd Owner, till ſuch a Time as the future Heir enters on the Poſſeſſion of it. And aſſoon as he enters, the Time of the Entry is brought back to the Death of the *Teſtator*, and the Poſſeſſion is continued in his Perſon. By all which Conſiderations, your Lordſhips were ſo much mov'd when the ſame Queſtion was debated before you, between *Bannantine* of *Corhouſe* and *Weir* of

*Blackwood*; and you had been constituted *Arbiters* in the Case that you prefer'd the future Heir to him, who was only alive at the Time of the *Testator*'s Death. But, *my Lord* notwithstanding these Arguments I contend, That he ought always to be prefer'd, who is capable of succeeding to the Estate at the Time of the Death of the *Testator*; and that we ought not to expect a future and imaginary Heir, who is only supported by such *Popular* and common Principles of Law. For we are not always allow'd to dispose of our Goods in Prejudice of the Laws, and to the Disadvantage of a well regulated Common-Wealth; nor can any Man hinder the Laws from taking Place in his Testament; and since they sufficiently indulge our just *Dispositions*, why should they also pardon our Errors and Mistakes? And the Earl of *Levin* could easily have prefer'd

fer'd the future Heir by nominating a *Depoſitary* or *Truſtee*; nay we do not deny but that if he had expreſly provided that the future Heir ſhould be expected, he would at this Time infallibly be prefer'd.

So that, *My Lords*, Theſe ſpecious Pretences of Reſpect and Veneration for the ſacred Will of dying Perſons, do not at all concern us, ſince we meaſure the doubtful Will of the *Defunct* by his own Intereſt and Advantage. For when the *Teſtator* who was poſſeſs'd of a numerous Offspring, and had all the Reaſon in the World to hope they would continue to repreſent his Name to Poſterity, out of a juſt Care of his Friends and Relations, nominated at Random theſe *Subſtitutes*, ſo far remov'd from him, he cannot reaſonably be ſuppos'd to have had any other Deſign in View, than that by this Means he might give

give them a convincing Proof of his Friendship and Affection. And since he has all along so carefully provided for himself and his Family, we cannot possibly imagine he would ever have behav'd so unnacountably as intirely to destroy it by the Expectation of the second Son of the Lord *Chancellour*, who was yet unborn; especially considering that his Interest was so well secur'd by putting him into a Capacity of succeeding to his Estate, in Case he was alive at the Time of the *Testator*'s Death. And therefore since he was not born at that fatal Moment, there is no greater Injury done him than to one who is depriv'd of his Brother's Estate, by his Father's serving himself Heir, upon this Consideration that he was not alive, when he ought to have enter'd.

*My Lord*, The Suppoſition of a *Curator* to be given to the Goods of the

*Defunct*

*Defunct*, will not serve our Turn, and cannot possibly prevent the Inconveniencys which I have represented to your Lordship. For, as there is no absolute Necessity for it; and we ought not to have Recourse to unusual Remedies, as long as ordinary ones may be procur'd; so this *Curator* shall neither be capable of transacting, nor under any Necessity or Obligation of managing Affairs in such a Manner as is requisite in the present Case. And then no *Prescription* will run against the future Heir; nor can the *Curator* be imprison'd for the Debts of the *Defunct*. To remedy which Evils, we must necessarily invent new Stiles, and fall upon another Method than that of appointing a *Curator* to the Goods of the *Defunct*. Besides, the Inconveniencies, that arise from *Confiscation*, do still incommode us, which are prevented by the contrary

Scheme,

Scheme. For neither the Nature of the *Few*, nor the Liberality of the Prince can hinder a *Forfeiture* that continues for so many Years from hurting the *Defunct*. So that it would be the most unaccountable Piece of Madness imaginable for us to believe the Words of the *Testator* ought to be interpreted in such a Sense, as naturally infers *Confiscation*.

And why in doubtful Cases ought Successions to be expos'd to so dangerous and invincible Difficulties? Nor is our Case, in which all these Inconveniencys are so happily prevented by the *Testator*, to be compar'd with *Forfeiture*, *Recognition*, and other Casualitys, which necessarily arise from the Nature of the *Few*; nor with the open and express Will of the dying Person, in which either the *Laws* or the *Defunct* have commanded the future Heir to be expected.

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Let us therefore, *My Lord*, enquire into the Differences that are adduc'd between the *legal* and *proviſional* Succeſſion. And, at firſt View, we ſhall find the *proviſional one* will admit of no Alteration. For ſince the *Proviſion* or *Taizie* is at leaſt a Kind of Succeſſion, it muſt retain all theſe Qualities which flow from the *univerſal* Nature of Succeſſion, except theſe only that are adjected to it by the Tenor of the *Proviſion* which only changes the Perſons that are to ſucceed, but not the Method of ſucceeding. And therefore *Menoch.* (*a*) does excellently obſerve, 'That Succeſſion, by a Teſtament, admits of Interpretation from *inteſtate* Succeſſion, and is regulated by it, inſomuch that in a doubtful Caſe, thoſe that are call'd in the Teſtament are ſuppos'd to be invited in the ſame Way and Order



(*a*) Concil. 198. Num. 14.

they would have succeeded *ab intestato*. These Arguments, which require a present and living Heir in a legal Succession, that so the *Defunct* may not want one to manage his Affairs, nor the Creditors one to represent their deceas'd Debtor, have the same Force and Validity in the one Case as in the other. Nay, it is certain, he more carefully provides for his Family, who nominates many, lest he should want an Heir. We ought not to recede from the general Disposition of the Laws, unless there be an obvious Exception, which is plainly permitted by them; but no Law can be alledg'd, whereby a future *substitute* is to be expected; except in some Instances which no Way relate to the present Case. Where he who is yet unborn, is alive at the Time of the Death of the Testator, but exists in the Womb; in which Case, seeing it

cannot be said that an Heir is wanting, since in Law a *Posthumous* Child does always pass for one already born, when it may possibly conduce to his Advantage: It naturally follows that a *Posthumous* Child ought to be expected. And therefore in *L.* 17. *ff. De Vulg. & Pupil. substitut.* we find these Words; 'He also can be *substituted* to the Children of the Family, who is born after the Death of the *Testator*.

Now to whom the Heir was *substituted*, the *Commentary* declares; 'I have appointed my Son, who is yet in the Age of Pupillarity to be my Heir, and afterwards, thus order'd Matters, If any Son be born to me after the Death of the said *Minor*, whom I have instituted my Heir, let him succeed to the aforesaid *Minor*, and then I died, and afterward the *Minor* deceas'd also;

and by my Wife, who was big with Child, and alive at the Time of my Death I had a *Posthumous* Son. Now, to be sure, this *Posthumous* Child shall succeed to the Estate of his deceas'd Brother. And by 16. *ff. De Leg.* 1. this is expresly enacted concerning a *Posthumous* Son.

Altho' an Estate cannot possibly descend to a future Heir, because he is not capable of succeeding to it; yet a *Legacy* may be left unto him. For a *Legatar* is neither oblig'd to manage the Affairs, nor pay the Debts of the Defunct. And therefore it is not necessary, that when he ought to *confirm* himself he be either alive or capable of succeeding. I acknowledge that in *Fidei Commissis*, the *Fiduciary* Heir can be nominated until a certain Day, and be expected, tho yet unborn. For the *Fiduciary* Heir, whom the *Defunct* has intrusted with his Estate

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does support the Property of it in his own Person, and, passing for the *Direct* Heir, effectually hinders the Dominion from being uncertain, and the *Defunct* from wanting an Heir. From whence *Perez*: to this Question 'Whether it be lawful for one to leave a '*Fidei Commiss.* as he pleases, either '*purely*, or upon a Condition, or from 'a certain Day? Returns this Answer, That in this Case the *Testator* is 'allow'd a free Choice, and that this 'makes an essential Difference between an *Heritage* and *Fidei Commiss.* 'because an Estate cannot be left directly from a certain Time. The Reason of which Difference seems to be this, 'That from the *Institution* 'of an Heir made either until or 'from a certain Time, it would follow that one might die, partly with 'a Testament, and in some Measure 'without one. But there is no Dan-

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'ger of this in a *fiduciary* Heir; for he 'is not properly the Heir, but only 'supplies his Place, which are two 'different Things. So that if the *Defunct* had been willing to expect one that was yet to be born, he both could and ought to have interpos'd a *fiduciary* Heir, that so, during the Dependance of the Condition, he might represent the Heritage. By which Remedy, all the Absurdities and Inconveniencys, Adversarys have alledg'd, might be easily prevented: For if the *Testator* resolv'd to appoint any of his Brother's Children to be his Heir, who should marry his Daughter, and to *substitute* to him the Sons of that Marriage, he might easily commit the Heritage to the Care and Honesty of some faithful Friend, who would represent it, while the Condition depended, and might bind and oblige him to restore the Estate to those Heirs,

Heirs, for whom it was provided, and to reſign it in Favour of them, aſſoon as they ſhould be capable of ſucceeding to it. And this is at preſent made uſe of by many of our Countrymen, as a neceſſary and lawful Remedy; the Event never failing to anſwer their Expectation. But ſince the *Defunct* has not in this Manner call'd his Succeſſors, but only us'd theſe Words, (*who failing*) we may ſafely conclude he has invited 'em in that Order, which on ſuch Occaſions is uſual and lawful. Nor ſhould we in this Caſe conſider what he ought to have done, but what he has actually perform'd. And the Dominion cannot be ſaid to ſubſiſt, during the Dependance of the Condition; for if this were granted, a *Fiduciary* Heir would be very unneceſſary, and the Rules, preſcrib'd us by *Vinnius*, ſuperfluous and uſeleſs. And becauſe the *Empty Heritage* without

out an Heir is not capable of managing the Affairs of the *Defunct*, therefore the Laws require either a *direct* or *Fiduciary* Heir. And in our Law the empty *Heritage* is oppos'd to the Heir and Maſter; ſo far is it from ſupplying their Place.

*My Lord*, As to that vicious Circle, whereby our Adverſarys contend that this Abſurdity will happen, that at this Time the ſecond Son of the Lord *Melvil* ſhall ſucceed and be ſerv'd Heir, and afterwards upon the Birth and Exiſtence of the *Lord Chancellor*'s ſecond Son, that firſt Heir will be depriv'd of the Eſtate, and then the Son of the *Lord Chancellor*, dying without Children, the *Lord Melvill* ſhall be reſtor'd to his Fortune; and thus the *fluctuating* and uncertain *Heritage* ſhall eternally go round in a ridiculous Circle: To this Difficulty, I ſay, it may be anſwer'd, that the Heritage

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appertains to him alone, who had the good Fortune to exist at the Time of the *Testator*'s Death, and that there is no more Place for a future Heir, nor can he reasonably be expected; *since he who is once Heir, is always so.* Nor can the first *Service* be *reduc'd* upon the Existence of the future Heir, unless the *Defunct* had expressly provided, that this *Fiduciary* Heir should give Place to the *Substitute.* In which Case no greater Absurdity shall happen, than daily falls out in the *Resignations* of *Fiduciary* Heirs. Nor, *My Lord*, does the Case of *Blackwood* do us any Prejudice; for there the presum'd Will of the *Defunct* induc'd the *Judges* to determine the Affair in Favour of his Grand-Child: and there Lordships desir'd the *Parties*, and the living Heir (not the future *Substitute*) to refer the Matter to their *Arbitration*, that so they might not be

too religiously bound by the Rigour of the Law. And this plainly shews they were sensible that such a Case as ours, ought certainly, according to the constant Tenor of the Laws to be determin'd in Favour of that Grand-Child by his Daughter, who existed at the Time of the Death of the *Testator*.

So that in *that* Case there was a living Heir; in this there is one who is yet unborn: There the Sisters Son of the *Defunct* pursu'd a Stranger; here a Stranger contends with a Sister's Son: There the Will of the *Testator* was clear and manifest, here it is doubtful and uncertain: In their Case there was one of the *Substitutes* alive to represent the *Defunct*, and pay his Debts; here there are none: There *Arbiters* gave a *Decreet*, according to Equity; here *Judges* must determine the Matter according to Law.

FINIS.